89-1647
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

EULALA SHUTE and RUSSEL SHUTE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a long-arm statute constitutionally reach a defendant whose activities in the forum state are insubstantial and bear only a tenuous relationship to the cause of action?

2. Is a forum selection clause in a steamship passenger ticket enforceable?

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, dated February 22, 1990, is to be reported at 897 F.2d 377 and is reproduced at pages 1a-24a of the Appendix to this Petition. The original opinion of the court of appeals, dated December 12, 1988, is reported at 863 F.2d 1437 and reproduced at Pet. App. 25a-48a. The order of the court of appeals withdrawing the original opinion and certifying a question to the Supreme Court of Washington is reported at 872 F.2d 930 and reproduced at Pet. App. 49a. The opinion of the Washington Supreme Court on the certified question is reported at 113 Wash. 2d 763 and 783 P.2d 78 and reproduced at Pet. App. 50a-59a. The order and judgment of the United States District Court for the Western District of Washington, dated June 25, 1987, are not reported and are reproduced at Pet. App. 60a-65a.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves: the due process clauses of the Fifth and Fourteenth Amendments; two provisions of the Limited Liability Act, 46 U.S.C. §§ 183b & 183c; 28 U.S.C. §§ 1404(a) & 1406(a); Rule 4 of the Federal Rules of Civil Procedure; and the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185. These materials are reprinted at Pet. App. 66a-71a.

STATEMENT OF THE CASE

This case is an action against a nonresident corporation for personal injuries occurring on a cruise in international waters, based upon the admiralty and maritime jurisdiction of the federal courts, 28 US.C. § 1333.

Respondents Eulala and Russel Shute filed this suit to recover damages for injuries occurring when Mrs. Shute slipped and fell during a seven-day cruise on the M/V TROPICALE from Los Angeles to Puerto Vallarta, Mexico. Pet. App. 2a-3a. The fall occurred in international waters off the coast of Mexico, while Mrs. Shute was on a guided tour of the ship's galley. *Id.* Respondents are residents of Washington State. Pet. App. 2a.

The TROPICALE is operated by Petitioner Carnival Cruise Lines, Inc., a Panamanian corporation with its principal place of business in Miami, Florida. Pet. App. 2a. The courts below found, based on undisputed facts, that Carnival does not have property or offices in Washington or operate ships that call at Washington ports. Its sole activities in the state were found to consist of buying advertisements for its cruises in local newspapers

and encouraging local travel agents to sell its cruises by distributing brochures, holding seminars, and paying a 10 percent commission. *Id.* In 1985 and 1986, Carnival's revenues from residents of Washington were 1.29 and 1.06 percent, respectively, of its total revenues. Pet. App. 7a.

Carnival issued the tickets in Florida upon receipt of payment from respondents' local travel agency and sent the tickets to respondents in Washington. Pet. App. 2a. The tickets contained the terms of the passage contract, including the following forum selection clause:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

Pet. App. 3a.

Respondents filed this suit in the United States District Court for the Western District of Washington and served Carnival with a summons pursuant to the Washington long-arm statute, Wash. Rev. Code Ann. § 4.28.185, as provided by Rule 4(e) of the Federal Rules of Civil Procedure. Pet. App. 4a-5a. Carnival moved for summary judgment dismissing the case for lack of personal jurisdiction or on the basis of the forum selection clause. Carnival alternatively sought transfer to the United States District Court for the Southern District of Florida. Pet. App. 3a.

The Honorable Carolyn R. Dimmick, United States District Judge for the Western District of Washington, granted Carnival's motion for summary judgment and dismissed the case for lack of personal jurisdiction. Pet. App. 60a-65a. The district court held that Carnival did not have sufficient contacts with the forum state to support the exercise of long-arm jurisdiction consistent with

the due process clause of the Fourteenth Amendment. Pet. App. 64a. The district court did not consider the effect of the forum selection clause in the ticket passage contract. Pet. App. 60a.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed in an opinion authored by the Honorable Betty B. Fletcher and joined by Circuit Judges Robert Boochever and Stephen S. Trott.[1] Pet. App. 25a-48a. The court of appeals agreed with the district court that Carnival's activities relating to the forum state were not sufficient to support the exercise of general *in personam* jurisdiction. Pet. App. 30a-31a. However, the court of appeals held that respondent's claim "arose out of" Carnival's advertising and promotional activities directed at the forum state and was thus subject to the exercise of "specific" *in personam* jurisdiction. Pet. App. 31a-44a.

After Carnival filed a timely petition for rehearing with suggestion for rehearing *en banc*, the court of appeals withdrew its opinion and certified to the Washington Supreme Court the question of whether the Washington long-arm statute conferred personal jurisdiction over Carnival for the claim in this case.[2] Pet. App. 49a. The Supreme Court of Washington held that the state long-arm statute extended as far as permitted by the due process clause and, relying upon the withdrawn opinion of the court of appeals, held that assertion of personal jurisdiction in the present case would not violate due process. Pet. App. 58a-59a.

The court of appeals subsequently issued an amended opinion, reaching the same conclusions as its original

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[1] Appellate jurisdiction was based on 28 U.S.C. § 1291.

[2] This question was apparently certified because a recent decision by an intermediate appellate court in Washington had held there was no long-arm jurisdiction on similar facts. *Banton v. Opryland U.S.A., Inc.*, 53 Wash. App. 409, 767 P.2d 584 (1989). *See* Pet. App. 51a-52a.

opinion. Pet. App. 1a-24a. Petitioner has never been informed of any action by the court of appeals on its suggestion for rehearing en banc, but this petition for certiorari is being filed as required by the last sentence of Rule 13.4 of the rules of this Court.[3]

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATES AS TO WHEN A CAUSE OF ACTION ARISES OUT OF OR RELATES TO ACTIVITIES IN THE FORUM STATE FOR THE PURPOSE OF ASSERTING "SPECIFIC" *IN PERSONAM* JURISDICTION.

This case presents the question of what kind of relationship is necessary between a plaintiff's cause of action and a defendant's contacts with the forum state in order to support the assertion of "specific" *in personam* jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment. The Court explicitly identified this issue but declined to decide it in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984). *Compare id.* at 424-28 (Brennan, J., dissenting).

This is an issue that frequently arises and has been resolved in conflicting ways by the state courts and lower federal courts. It has provoked a lively debate among legal scholars. It is ripe for resolution by this Court, and the present case presents a good context for deciding it.

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[3] As required by Rule 29.4(c), petitioner notes that this petition draws into question the constitutionality of a Washington statute, that 28 U.S.C. § 2403(b) may therefore be applicable, and that the court below did not certify to the state attorney general that the constitutionality of a state statute was drawn into question.

There is no parent company or subsidiary (other than wholly-owned subsidiaries) to be listed pursuant to Rule 29.1.

A. The Due Process Clause of the Fourteenth Amendment Requires Certain Minimum Contracts to Support Long-Arm Jurisdiction.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, this Court has held that the Due Process Clause of the Fourteenth Amendment imposes significant limits on the ability of states to employ long-arm statutes to assert jurisdiction over nonresident defendants. The defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (citations omitted).[4]

When the cause of action does not arise out of or relate to the defendant's activities in the forum state, those activities must be sufficiently "continuous and systematic" to make the assertion of *in personam* jurisdiction reasonable. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952). This is often referred to as an assertion of "general" *in personam* jurisdiction. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 414 n.9, and authorities cited therein.[5]

On the other hand, "specific" jurisdiction requires a lesser showing of contacts with the forum state, so long as "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S.

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[4] *See generally* Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689 (1987); Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. Fla. L. Rev. 293 (1987).

[5] In the present case, the court of appeals cited this Court's *Helicopteros* decision and correctly held that Carnival's contacts with the forum state were not sufficient to support an assertion of general jurisdiction. Pet. App. 6a-7a. This holding is unremarkable and does not present any issue for review in this Court.

462, 472 (1985) (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 414). In cases involving specific jurisdiction, "the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction." *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 415 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

This Court has recently considered a number of cases involving the constitutionality of an assertion of specific *in personam* jurisdiction, where the issue was whether a defendant had sufficiently directed its activities at the forum state so that it was foreseeable, and thus fair, to subject it to litigation arising out of or related to those activities. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (denying jurisdiction for suit involving product manufactured in a foreign country and placed in stream of commerce with knowledge that it would be sold in forum state; opinion for the Court limited to unfairness of asserting jurisdiction on particular facts of the case); *Burger King v. Rudzewicz, supra* (upholding jurisdiction for suit involving contractual relationship of nonresident franchisee); *Calder v. Jones*, 465 U.S. 783 (1984) (upholding jurisdiction for libel suit based upon distribution of publication in plaintiff's home state); *Keeton v. Hustler Magazine, Inc., supra* (upholding jurisdiction for libel suit by nonresident based upon regular distribution of publication to forum state); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (denying jurisdiction where automobile is sold to plaintiff and then driven to forum state). In none of these cases in which jurisdiction was found was there any doubt that the cause of action directly arose out of the activity that was asserted to form the requisite minimum contact between the defendant and the forum state.

This Court has had little occasion to consider the other part of the test for asserting specific personal jurisdic-

tion—whether the alleged contact with the forum state sufficiently "arises out of or relates to" the subject matter of the litigation. In *Keeton*, the Court noted that the activities of defendant Hustler Magazine, Inc. in the forum state might not have been sufficient to support general jurisdiction, but held that defendant's magazine sales supported jurisdiction over the libel suit, as the suit arose "out of the very activity being conducted, in part," in the state. 465 U.S. at 779-80. The issue was discussed in the dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 424-28, but the opinion of the Court declined to reach it on the ground that it had not been raised by the parties. *Id.* at 415-16 & n.10.

B. There Is a Serious Division of Authority on What Sort of Relationship Must Exist Between the Litigation and the Defendant's Activities in the Forum State So As to Support the Assertion of Specific Jurisdiction.

The court of appeals in this case perceived a conflict among the circuits on how to apply the "arising out of" requirement for asserting specific *in personam* jurisdiction and adopted what it viewed as the less restrictive test of "but for" causation rather than a more restrictive test of proximate cause. Pet. App. 15a.[6] The court of

[6] The court of appeals cited the following cases (Pet. App. 12a-15a) as supporting its test. *Cubbage v. Merchent*, 744 F.2d 665, 670 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985); *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir.), *cert. denied*, 109 S. Ct. 310 (1988); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981).

The court acknowledged (Pet. App. 12a) that it would have reached the opposite result if it had applied the legal test adopted by two other circuits. *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983). Both of those decisions were based upon the long-arm statutes themselves rather than the Fourteenth Amendment. However, in each case, the relevant statutory ground was an "arising out of" test identical to what the court of appeals in the present case regarded as constitutionally mandated.

appeals held that "but for" Carnival's promotional and advertising activities in the State of Washington, Mrs. Shute would not have taken the cruise on which she was injured, and therefore the injury "arises out of" the promotional and advertising activities. Pet. App. 17a.

The dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall* suggests that this issue should instead be framed in terms of whether specific jurisdiction may be asserted for lawsuits that "relate to" but do not "arise out of" the defendant's activities directed at the forum state. 466 U.S. at 420 (Brennan, J. dissenting). As noted above, the opinion of the Court declined to address the "validity or consequences of such a distinction . . . ." *Id.* at 415 n.10.

In addition to the foregoing, numerous other verbal formulae have been adopted by various courts in an effort to describe the relationship that is necessary between the defendant's activities and the litigation to support the exercise of specific *in personam* jurisdiction.[7]

These differences are not merely semantic but instead reflect a fundamental disagreement as to whether the necessary relationship should be weak or strong. Regardless of what verbal test they employ, the court of appeals in the instant case, the dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, and a number of state and lower federal courts have held that a relatively

[7] *See, e.g., City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985) ("coincides with"); *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 384 n.27 (6th Cir. 1968) ("substantial connection with"); *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984) ("connected with"); *Cornelison v. Chaney*, 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264, 268 (1976) ("substantial nexus"). Even within the dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, a variety of terms was employed to describe the necessary relationship. *See* 466 U.S. at 420 ("direct relationship"); *id.* at 426 ("directly related"); *id.* at 425 ("significantly related"); *id.* at 426 ("substantial relationship").

tenuous connection between a defendant's forum-related activities and the cause of action is sufficient to support specific *in personam* jurisdiction.[8] Other state and federal courts have required a much stronger connection to support an assertion of jurisdiction.[9] This division of authority among the courts has been accompanied by a vigorous debate on the same question among legal scholars.[10]

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[8] *See, e.g., Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 909-11 (6th Cir. 1988) (telephone conversations and correspondence with out-of-state accrediting body support jurisdiction for discriminatory denial of certification); *Cubbage v. Merchent*, 744 F.2d 665, 670 (9th Cir. 1984) (phone book listing and participation in Medi-Cal program for other patients support jurisdiction for out-of-state medical malpractice); *Cornelison v. Chaney*, 16 Cal. 3d 143, 127 Cal. Rptr. 352, 545 P.2d 264, 268 (1976) (upholding jurisdiction for out-of-state traffic accident where defendant was on his way to do business in forum state).

[9] *See, e.g., Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964) (sale of tickets through travel agency does not support jurisdiction for personal injury on out-of-state bus trip); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968) (advertising and telephone conversations do not support jurisdiction for personal injury at out-of-state lodge); *Camelback Ski Corp. v. Behning*, 312 Md. 330, 539 A.2d 1107, 1111-12 (1988) (toll-free telephone number and other solicitation activity do not support jurisdiction for personal injury at ski resort); *V & V Corp. v. American Policyholders' Ins. Co.*, 127 N.H. 372, 500 A.2d 695, 698-99 (1985) (no jurisdiction over out-of-state traffic accident where defendant was returning from business activities in forum state); *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307, 1310-12 (Utah 1980) (telephone call and unrelated sales activity do not support jurisdiction for alleged breach of oral contract).

[10] *See, e.g.*, von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966); Brilmayer, *How Contacts Count: Due Process Limitations and State Court Jurisdiction*, 1980 S. Ct. Rev. 77; Richman, *A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction (Part II)*, 72 Calif. L. Rev. 1328, 1336-46 (1984); Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988); Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988); Twitchell, *A Rejoinder to Professor Brilmayer*, 101 Harv. L. Rev. 1465 (1988).

Where the assertion of *in personam* jurisdiction is not simply an effort to regulate the defendant's in-state activity, it becomes necessary to justify specific jurisdiction on the basis of the defendant's implied consent by virtue of those in-state activities. The expansive and restrictive approaches to specific jurisdiction can thus be regarded as corresponding to expansive and restrictive views of the level of in-state activity making it reasonable to impose the *quid pro quo* of submission to the state's courts disputes involving transactions or events occurring outside the state.

As the numerous citations in this petition suggest, the issue here presented arises frequently in litigation and is of substantial importance to the work of the federal and state courts. The Court should grant certiorari in this case to resolve the issue and provide important guidance to the state and lower federal courts to assist in the uniform implementation of this constitutional doctrine.

C. This Is an Appropriate Case for Resolving the Issue Presented.

This case presents a good context for deciding the issue presented because it involves the travel industry and the issue often arises in factual situations similar to those presented here.[11] In a typical case, a carrier or resort has some tenuous contacts with the forum state, consisting mostly of advertising and sale of tickets or reservations through independent travel agencies. A resident of the forum state is then injured in another jurisdiction, returns home, and sues the hotel, cruise line or airline. The state courts and lower federal courts have divided sharply on whether this fact pattern can support an assertion of *in personam* jurisdiction consistent with the Due Process Clause of the Fourteenth

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[11] *See* Knudsen, *Jurisdiction Over the Travel Industry: A Proposal to End Its Preferential Treatment*, 1983 B.Y.U. L. Rev. 101.

Amendment.[12] Petitioner has itself been subjected to conflicting resolutions of this issue.[13] In such cases, the inquiry could be characterized as turning on whether the out-of-state injury "arises out of or relates to" the advertising and promotional activity directed at the forum state.

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[12] Cases upholding jurisdiction, in addition to the present case, include *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383 (E.D. Tex. 1989) (personal injury while descending steps of ski lodge); *Gullett v. Quantas Airways Ltd.*, 417 F. Supp. 490, 497 (D. Tenn. 1975) (airline failed to give passenger an emergency message from a relative until after take-off); *Hollingsworth v. Cunard Line Ltd.*, 152 Ga. App. 509, 263 S.E.2d 190 (1979) (action against steamship line for breach of contract and fraud); *Reed v. American Airlines, Inc.*, 197 Mont. 34, 640 P.2d 912 (1982) (contents of luggage lost by airline on which plaintiff was not a passenger). *Cf. Ladd v. KLM Royal Dutch Airlines*, 456 F. Supp. 422 (S.D.N.Y. 1978) (action for wrongful death of stewardess in aircraft collision).

Cases denying jurisdiction include *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) (slip and fall in hotel room); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983) (personal injury at tourist attraction); *Scheidt v. Young*, 389 F.2d 58 (3d Cir. 1968) (injury during softball game at lodge); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964) (personal injury from bus crash); *Russo v. Sea World of Florida, Inc.*, 709 F. Supp. 39 (D.R.I. 1989) (personal injury in theme park); *Rutherford v. Sherburne Corp.*, 616 F. Supp. 1456 (D.N.J. 1985) (personal injury while disembarking from chair lift at ski resort); *Mulhern v. Holland America Cruises*, 393 F. Supp. 1298 (D.N.H. 1975) (slip and fall on cruise ship); *Camelback Ski Corp. v. Behning*, 312 Md. 330, 539 A.2d 1107 (1988) (personal injury from skiing accident); *Witbeck v. Bill Cody's Ranch Inn*, 428 Mich. 659, 411 N.W.2d 439 (1987) (fall from horse at dude ranch).

[13] *Compare Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985) (jurisdiction found) *with Dirks v. Carnival Cruise Lines, Inc.*, 642 F. Supp. 971 (D. Kan. 1986) (jurisdiction not found).

It makes no difference that this petition for certiorari involves a federal question case arising under the admiralty jurisdiction of the federal courts. This Court's recent decision in *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), holds that Rule 4(e) of the Federal Rules of Civil Procedure makes amenability to service of process in a federal question case dependent upon the permissible reach of the forum state's long-arm statute, unless there is some other federal rule or statute authorizing service. *Id.* at 103-05. Where, as here, the state long-arm statute is construed to reach the maximum extent permitted by the Fourteenth Amendment, the issue of *in personam* jurisdiction is identical to that presented in diversity cases, where Rule 4(e) also requires the federal court to rely upon the state long-arm statute.[14]

II. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE VALIDITY OF FORUM SELECTION CLAUSES IN PASSENGER TICKET CONTRACTS.

This case also presents the question of when a forum selection clause in a passenger ticket contract is enforceable, requiring dismissal or transfer of an action brought

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[14] This case thus does not present the issue, reserved in *Omni Capital* and *Asahi*, of whether Congress could create a more liberal standard for personal jurisdiction under the Fifth Amendment than would be permitted to a state under the Fourteenth Amendment. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987) (Opinion of O'Connor, J.).

Here, Congress has not so provided, and this case is thus like most diversity and federal question cases in which a federal court is required by Rule 4(e) to serve nonresident defendants pursuant to the long-arm statute of the state in which it sits. Such state statutes are subject to the Fourteenth Amendment as construed by *International Shoe* and its progeny. *See generally* Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. 85, 130-40 (1983); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1075 (1987).

before a forum other than the one specified in the contract. In a case involving an international commercial agreement, this Court has held that admiralty law establishes a strong presumption in favor of enforcing a forum selection clause. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The Bremen"*). The Ninth Circuit in this case correctly stated that a cruise ticket is governed by the federal law of admiralty. *See Shute*, Pet. App. 21a.[15] It held that the test set forth by *The Bremen* is therefore controlling. *Id.* The panel found that the presumption of validity mandated by *The Bremen* was overcome on two grounds: first, because the clause was part of a preprinted contract and had not been bargained for, and second, because the inconvenience to the Shutes of litigating the claim in Florida would effectively deprive them of their day in court. Pet. App. 23a-24a.

In reaching this result, the Ninth Circuit has created a square conflict with the holding of the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *petition for cert. dismissed*, 109 S. Ct. 1633 (1989).[16] The effectiveness of a forum selection clause is frequently a threshold issue in lawsuits stemming from injuries incurred during travel.[17] To re-

[15] *See also Archawski v. Hanioti*, 350 U.S. 532 (1956); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1886).

[16] The decision of the Ninth Circuit below is also in conflict with the decision of the Fourth Circuit in *Catalana v. Carnival Cruise Lines, Inc.*, 618 F. Supp. 18 (D. Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986). In that case, the district court ruled that the forum selection clause in the passenger ticket was incorporated into the terms of the contract between the carrier and the passenger and that the clause must be enforced. The district court also held that it lacked personal jurisdiction. The Fourth Circuit affirmed without issuing an opinion for publication.

[17] Numerous district courts have been confronted with the question of whether to enforce a forum selection clause in a passenger ticket contract. *See Everett v. Carnival Cruise Lines, Inc.*, 677 F. Supp. 269 (M.D. Pa. 1987); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563 (S.D.N.Y. 1987); *Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985). The clauses were enforced in all of these cases. In the litigation leading to *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976 (1989), the district court held that the forum selection clause was not enforceable. *See Klinghoffer v. Achille Lauro*, 1988 A.M.C. 636 (S.D.N.Y. 1987).

solve the intercircuit conflict on this issue, the Court should grant certiorari in this case.[18]

A. Federal Admiralty Law Strongly Favors Enforcement of Forum Selection Clauses.

In *The Bremen*, the Court upheld a forum selection clause in a maritime contract requiring that any disputes be brought before the London Court of Justice. The contract was for the towing of an oil drilling rig from Louisiana to the Adriatic Sea. After the oil rig was damaged while being towed, it was brought to port in Tampa, Florida. The owner of the rig sued in federal district court in Tampa rather than in the contractual forum. 407 U.S. at 3-4. The district court and the court of appeals rejected the defendant's motion to dismiss or stay based on the forum selection clause, holding that the defendant had not met its burden to show that London would be a more convenient forum than Tampa. *Id.* at 6-7.[19]

[18] In *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976 (1989), this Court held that an order denying a motion to dismiss for failure to comply with a forum selection clause is not immediately appealable. There is no issue in this case as to whether the district court's decision was appealable; the dismissal of the Shute's action unquestionably constituted a final order.

[19] The court of appeals also relied partly on the likelihood that the London court would enforce an exculpatory clause in the contract, relieving the defendant of liability in contravention of U.S. admiralty law. *Id.* at 3 n.2, 8. There is, of course, no issue as to choice of law in this case; federal admiralty law will govern the

This Court reversed. Rather than placing the burden on the defendant, the Court held, "the forum selection clause should control absent a strong showing that it should be set aside." *Id.* at 15. The Court stated that the plaintiff "must clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* At least as to "a freely negotiated international commercial transaction," *id.* at 17, the Court held that "it should be incumbent upon the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. It is not enough for the plaintiff to show only that "the balance of convenience is strongly in favor of" a non-contractual forum. *Id.* at 19. Even where "the agreement was an adhesive one," the Court stated that "the party claiming should bear a heavy burden of proof." *Id.* at 17.

Decisions of the courts of appeals, pre- and post-*Bremen*, have enforced conditions in passenger cruise ticket contracts, provided that the tickets gave reasonable notice to the passenger of the existence of additional terms in the contract. The First, Second, Third, and Fifth Circuits have upheld the validity of contract terms requiring that the passenger notify the carrier of any claims within a specified period or that the passenger bring suit within a specified period.[20] The Second Circuit

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Shutes' claim whether brought in Washington or Florida. Under 46 U.S.C. § 183c, an exculpatory clause in a ticket contract cannot limit a carrier's liability to its passengers for negligence or fault. *See* pp. 19-22 *infra*.

[20] *See Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983); *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Geller v. Holland-America Line*, 298 F.2d 618 (2d Cir. 1962); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Carpenter v. Klosters Rederi*, 604 F.2d 11 (5th Cir. 1979); *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464 (5th Cir. 1972).

In some cases, courts of appeals have held a term not to bind a passenger because the ticket did not give sufficiently conspicuous notice of the existence of additional terms or because the passenger did not receive the ticket at all until boarding. *Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988); *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983); *see also The Majestic*, 166 U.S. 375 (1897).

has upheld a choice of law clause providing that English law would govern.[21]

B. The Decision Of The Ninth Circuit In This Case Is Squarely In Conflict With That Of The Third Circuit In *Hodes*.

In *Hodes*, the Third Circuit enforced a forum selection clause in a preprinted passenger ticket contract. Although the *Shute* decision does not refer to the Third Circuit's contrary analysis and result in *Hodes*, the issues pertaining to the forum selection clauses in the two actions are essentially identical. The clause in *Hodes* was, if anything, more burdensome than the one at issue here, as it required that all claims be brought in Naples, Italy.

The Hodeses brought suit in federal district court in New Jersey for claims based on the October 7, 1985 terrorist seizure of the *Achille Lauro*, on which they were passengers. The district court denied the defendants' motion for dismissal, holding the clause unenforceable. The court of appeals reversed. The court of appeals first considered, under the standard set forth in *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir. 1987), whether the forum selection clause was reasonably communicated to the Hodeses. The court noted that the cover included a statement referring passengers to

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[21] *See Siegelman v. Cunard White Star Line, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

the contract terms printed inside; the ticket coupons themselves included a statement that they were "subject to the terms, conditions and regulations set out herein." *Hodes*, 858 F.2d at 910. The page of terms and conditions was captioned, "TERMS AND CONDITIONS OF CONTRACT OF PASSAGE AND BAGGAGE." The forum selection clause was article 31 of 32 articles. *Id.* Because the various statements gave the Hodeses reasonable notice of the clause, the court held that it was incorporated into the contract for passage. *Id.* at 910-11.[22]

Second, having determined that the forum selection clause was incorporated into the contract, the court considered whether it should be enforced. The Third Circuit in *Hodes*, like the Ninth Circuit in *Shute*, held that *The Bremen* was controlling. *Id.* at 912. In applying *The Bremen*, however, the Third Circuit rejected the very arguments that the Ninth Circuit accepted as to the enforceability of the clause. The Third Circuit acknowledged that the contract in *The Bremen* was the product of negotiation between sophisticated businesses, and that the defendants in *Hodes* had a superior bargaining position to the ticket purchasers, but held that the defendants "did not take unfair advantage of that position to 'overween' the Hodeses." *Id.* at 913. The court pointed out that the defendants were contracting with purchasers worldwide and that the ship itself would enter a number of jurisdictions. As a result, the court found, the defendants had a legitimate interest in seeking certainty as to where suit could be brought against them. *Id.*

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[22] As was the situation in *Shute*, Pet. App. 23a n.11, the Hodeses did not receive the terms and conditions until after they purchased the tickets. In fact, the Hodeses contended that their tickets were held for them by the travel club through which they purchased the tickets until they boarded the ship. 858 F.2d at 911-12. The Third Circuit noted that the Hodeses could have requested an opportunity to review the tickets in advance and held that, in any event, the club was serving as agent for the Hodeses; the Hodeses were consequently charged with notice of the terms. *Id.* at 912.

The Third Circuit also rejected the view that "trial in the contractual forum will be so gravely difficult and inconvenient" that the Hodeses would "for all practical purposes be deprived of [their] day in court." *Id.* at 916 (*quoting The Bremen*, 407 U.S. at 18). The Hodeses could not show either that they "would face blatant prejudice in the foreign forum" or that litigation in the contractual forum "would be severely impractical." 858 F.2d at 916. In assessing the practicality of litigation in the contractual forum, the Third Circuit stated that the inquiry is not whether the forum is convenient for the plaintiffs, but whether there are circumstances making it impractical for the dispute to be litigated there at all.[23] In contrast, the Ninth Circuit considered only the convenience to plaintiffs and their witnesses, the limited and one-sided inquiry that the Third Circuit rejected. Pet. App. 24a.

C. The Ninth Circuit Improperly Disregarded 46 U.S.C. §§ 183b and 183c.

Two provisions of the Limited Liability Act[24] are relevant to this case. Under 46 U.S.C. § 183b, a carrier cannot impose a period of less than six months for the passenger to give notice of a claim or less than one year for a passenger to file suit. Pet. App. 66a-67a. Under 46 U.S.C. § 183c, a carrier cannot limit its liability to its passengers for negligence or fault. Pet. App. 67a-68a.

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[23] The Hodeses also advanced a public policy argument, based on 46 U.S.C. §§ 183b and 183c and on common law, that the forum selection clause was invalid because Italian law might enforce provisions of the contract limiting the amount of defendant's liability for negligence. 858 F.2d at 914-15. Following *The Bremen*, the court rejected that argument. *Id.* As noted earlier, no such issue of choice of law is present in this case. *See* p. 15 n.19 *supra*. The effect of §§ 183b and 183c is considered further in the following section of this petition.

[24] 46 U.S.C. §§ 181 *et seq.*

Neither of these provisions, nor any other applicable statutes, refer to forum selection clauses.

In setting forth these specific limitations on passenger ticket contracts, Congress created only a limited regulatory scheme. The Ninth Circuit sidestepped the applicability of §§ 183b and 183c in an interesting manner, however. Rather than looking first to the relevant statutes to determine whether they are applicable, the court stated that "[b]ecause we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of [§ 183c] on forum selection agreements." Pet. App. 23a n.12. The court then suggested that, notwithstanding the specific nature of the statutory limitations, the decision of Congress to enact the limitations "exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners" and thereby establishes a requirement that courts undertake an "independent examination of the fairness of this type of contract." *Id.*

The court drew precisely the wrong conclusion from Congress's silence as to forum selection clauses. By not providing that forum selection clauses were among the abusive conditions that Congress sought to prohibit in §§ 183b and 183c, the statute lends support to the validity of such clauses. *Expressio unius est exclusio alterius.* The texts of these statutory provisions cannot legitimately be read as invitations to the judiciary to conduct an independent examination of a contract's fairness.

In the somewhat analogous context of the Carriage of Goods by Sea Act ("COGSA"),[25] the First Circuit has upheld a forum selection clause in a bill of lading that required suit in New York. *See Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974). The court rejected the argument

[25] 46 U.S.C. §§ 1300 *et seq.*

that a forum selection clause in a bill of lading is invalid under 46 U.S.C. § 1303(8) as a limitation of liability. Section 1303(8), like § 183c, nullifies any clause lessening a carrier's liability. The First Circuit declined to infer from that provision either a specific prohibition on forum selection clauses or a general policy in favor of scrutinizing such clauses for lack of fairness.

Where forum selection clauses in bills of lading required suit overseas, several courts of appeals have held that forum selection clauses are invalid as limitations of liability under § 1303(8). *See Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203-04 (2d Cir. 1967); *Union Ins. Soc'y, Ltd. v. S.S. Elikon*, 642 F.2d 721, 724-25 (4th Cir. 1981); *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987); *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989). These courts treated forum selection clauses as limitations of liability on the ground that enforcing the clauses could effectively reduce the liability of the carrier; the foreign courts might apply the controlling law differently than U.S. courts, and the clauses create an obstacle for the plaintiff in bringing suit.

The cases interpreting § 1303(8) in this manner may well have been wrongly decided. Like § 183c, § 1303(8) does not expressly prohibit forum selection clauses, and indeed should be read to approve of such clauses by omission. *See William H. Muller & Co. v. Swedish American Line Ltd.*, 224 F.2d 806, 807 (2d Cir. 1955), *overruled, Indussa, supra.*[26] Applying the rationale of these cases to § 183c would be more problematic still, as it would render § 183b entirely superfluous. If § 183c is read to invalidate procedural clauses that create an obstacle for the plaintiff, then the restrictions set forth in

[26] This Court cited *William H. Muller & Co.* with approval in *The Bremen* and distinguished *Indussa* on the ground that § 1303(8) "is not applicable in this case." 407 U.S. at 10 n.11.

§ 183b on time limits could equally well be grounded in § 183c. In fact, § 183c could then be used to create stricter restrictions on time limits than the explicit restrictions in § 183b.

In any event, because the forum selection clauses in *Indussa*, *Union Insurance*, *Conklin & Garrett*, and *Hughes Drilling Fluids* required suit overseas,[27] these cases are distinguishable from a case such as *Shute* that involves interstate rather than international forum selection. The First Circuit distinguished *Indussa* on that basis in *Fireman's Fund*. *See* 492 F.2d at 1296. Regardless of the state in which the Shutes bring the action, federal admiralty law will apply, and the Shutes will be entitled to appeal any erroneous application of that law within the same federal court system.

D. This Is An Appropriate Case For Resolving The Issue Presented.

This case presents an occasion for the Court to resolve an intercircuit conflict regarding an issue that arises frequently in the district courts.[28] Further, the enforcement of forum selection clauses is now less likely to reach this Court than it once was—not because the issue is occurring less often in the district courts, but because this Court's decision in *Lauro Lines* regarding interlocutory appeals renders such a dispute less likely to be brought to the courts of appeals in any particular case.

The intercircuit conflict on this issue was not resolved by this Court's recent decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). The court of appeals distinguished *Stewart* on the ground that it in-

[27] The clause in *Indussa* required suit in Norway; the clause in *Union Insurance* required suit in Germany; the clause in *Conklin & Garrett* required suit in Finland; and the clause in *Hughes Drilling Fluids* required suit in the People's Republic of China.

[28] *See* p. 14 n.17 *supra*.

volved a motion to transfer under 28 U.S.C. § 1404(a), whereas the present case involved a motion to dismiss or transfer under § 1406(a). Pet. App. 21a n.9. This is probably a valid distinction, although *Stewart*'s indication of a general policy of giving weight to forum selection clauses should have been taken into account by the court of appeals. *See Stewart*, 487 U.S. at 29, 31; *id.* at 33 (Kennedy, J., concurring).[29]

As the Third Circuit noted in *Hodes*, carriers have a legitimate interest in limiting disputes contractually to one forum, especially where multiple claims arise from a single incident. The *Hodes* litigation and the *Lauro Lines* litigation, both arising from the *Achille Lauro* tragedy, illustrate the possibility of related claims being brought in various jurisdictions. The proliferation of doctrinal approaches to the enforcement of forum selec-

[29] Some courts have misconstrued the *Stewart* decision to hold that forum selection clauses can never form the basis of a motion to transfer or dismiss under § 1406(a) but can only be a factor in considering transfer under § 1404(a). *See, e.g., Southern Distrib. Co. v. E. & J. Gallo Winery*, 718 F. Supp. 1264, 1267 (W.D.N.C. 1989). However, *Stewart* was a diversity case. Whether the forum selection clause there was enforceable as a matter of contract law would have been a question of state rather than federal law. A valid forum selection clause could support a motion to dismiss or transfer under § 1406(a), without regard to the other discretionary factors considered in deciding whether a forum is convenient for purposes of § 1404(a). *See D'Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708, 710 (D.R.I. 1983); 15 C. Wright & A. Miller, *Federal Practice and Procedure* § 3847, at 372 n.10 (1976). The only issue before the Court in *Stewart* was a motion to transfer under § 1404(a), which was held to be a procedural issue to be decided as a matter of federal rather than state law. 487 U.S. at 32.

In any event, this is an admiralty case, where the validity of a contractual forum selection clause is a question of federal law. As in *The Bremen*, a valid clause is enforceable in its own terms and not as one of many factors in the convenience analysis of § 1404(a). There is no indication that *Stewart* was intended to modify the holding of *The Bremen* in this regard.

tion clauses can serve only to defeat the certainty and stability that they are intended to achieve.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4063

D.C. No. CV-86-1204-D

EULALA SHUTE, and RUSSEL SHUTE,
Plaintiffs-Appellants,

v.

CARNIVAL CRUISE LINES,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Demmick, District Judge, Presiding

Argued and Submitted
October 5, 1988—San Francisco, California

Filed December 12, 1988
Withdrawn April 27, 1989
Amended and refiled: February 22, 1990

Before: Betty B. Fletcher, Robert Boochever and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Fletcher

AMENDED OPINION

Gregory J. Wall, Brousseau, Wall & Jankovich, Seattle, Washington, for the plaintiffs-appellants.

Jonathan Rodriguez-Atkatz, Bogle & Gates, Seattle, Washington, for the defendant-appellee.

FLETCHER, Circuit Judge:

Plaintiffs Eulala and Russell Shute appeal the district court's decision to grant the defendant's motion for summary judgment, dismissing their suit for damages. The district court granted the motion on the grounds that the defendant's forum-related activities were insufficient to support the exercise of personal jurisdiction in a manner consistent with due process. We reverse.

BACKGROUND

The defendant-appellee, Carnival Cruise Lines, is a Panamanian corporation with its principal place of business in Miami, Florida. It is undisputed that Carnival is not registered to do business in the State of Washington. It owns no property in Washington, maintains no office or bank account in Washington and pays no business taxes in Washington. It has never operated ships which have called at Washington ports. It has no exclusive agent in Washington. Carnival does, however, advertise its cruises in local Washington newspapers. It also provides brochures to travel agents in Washington, which in turn are distributed to potential customers. Carnival also periodically holds seminars for travel agents in the State of Washington to inform them about, and encourage them to sell, Carnival cruises. Carnival pays travel agencies a 10% commission on proceeds from tickets sold for Carnival cruises.

The plaintiff-appellants, who are Washington residents, purchased tickets through Smokey Point Travel in Arlington, Washington for a seven day cruise on a Carnival

Cruise Lines ship, the TROPICALE. The appellants were to embark in Los Angeles, California, sailing from there to Puerto Vallarta, Mexico. The tickets were purchased through the travel agent, who forwarded payments to Carnival in Miami. The tickets were issued in Florida, then forwarded to the appellants in Washington.

The passage contract ticket contained a forum selection clause that provided as follows:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

The appellants' cause of action arises from injuries suffered by Mrs. Shute when she slipped on a deck mat while on a guided tour of the ship's galley. This incident occurred in international waters off the coast of Mexico. The Shutes allege that the fall was due to the negligence of Carnival and its employees, and request damages arising out of personal injuries to Mrs. Shute.

Carnival moved for summary judgment on two grounds: first, that the district court lacked personal jurisdiction over Carnival; and second, that the passenger ticket contract required the Shutes to bring all claims against Carnival in the Florida courts. In the alternative, Carnival requested a transfer of the case to the U.S. District Court for the Southern District of Florida. The court addressed only the first issue, ruling that it lacked personal jurisdiction over Carnival. The Shutes timely appeal.

DISCUSSION

I. *Burden of Proof/Standard of Review*

The plaintiff has the burden of establishing that the court has personal jurisdiction. *Cubbage v. Merchent*, 744 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005

(1985). Where the trial court's ruling is based solely upon a review of affidavits and discovery materials, dismissal is appropriate only if the plaintiff fails to make a *prima facie* showing of personal jurisdiction. *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986); *Data Disc, Inc. v. Systems Tech. Assoc.*, 557 F.2d 1280, 1285-86 (9th Cir. 1977). *Cf. Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1396, n.1 (9th Cir. 1986) (where defendant challenges judgment entered against it on the merits, the plaintiff bears the full burden of proof of personal jurisdiction by the preponderance of the evidence).

A district court's determination that personal jurisdiction can properly be exercised is a question of law reviewable *de novo* when the underlying facts are undisputed. *Haisten*, 784 F.2d at 1396. For the purposes of this appeal, we treat the plaintiffs' allegations as correct. *Fields*, 796 F.2d at 301.

II. *Personal Jurisdiction*

This action was brought in admiralty in the U.S. District Court for the Western District of Washington. In order to establish personal jurisdiction, the Shutes must demonstrate that the forum state's jurisdictional statute confers personal jurisdiction, and that the exercise of jurisdiction accords with federal constitutional principles of due process. *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985).

Washington's jurisdictional statute provides, in relevant part, as follows:

> Any person whether or not a citizen or resident of this state, who, in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from

> the doing of said acts: (a) the transaction of any business within the state . . . .

Wash. Rev. Code 4.28.185. (West 1988). This statute has been construed by the Supreme Court of Washington to permit the assertion of jurisdiction to the extent permitted by due process, except where limited by the terms of the statute. *Deutsch v. West Coast Machinery Co.*, 80 Wash. 2d 707, 497 P.2d 1311 (1972).[1] For our purposes, "the statutory and constitutional standards merge into a single due process test." *Pedersen Fisheries, Inc. v. Patti Industries*, 563 F.Supp. 72, 74 (W.D. Wash. 1983).[2]

Considerations of due process require that non-resident defendants have certain minimum contacts with the forum state, so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). However, the nature and quality of the necessary contacts required vary, depending upon the type of jurisdiction asserted.

Courts may exercise either general or specific jurisdiction over non-resident defendants. General jurisdiction exists where the non-resident defendant has " 'substantial'

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[1] This opinion was withdrawn by order of the panel certifying to the Supreme Court of Washington the question of whether the Washington long-arm statute would confer personal jurisdiction over Carnival Cruise Lines for the claim asserted by the Shutes. The Supreme Court has now held "that the business activities of the cruise line in [the State of Washington] permits the assertion of jurisdiction." *Shute v. Carnival Cruise Lines*, No. 56089-7, slip op. (Wash. Dec. 7, 1989). The opinion is refiled as modified herein.

[2] Where jurisdiction is asserted under § 4.28.185(1)(a), the "transaction of any business" provision, the Washington courts apply a three factor test that is virtually identical to the specific jurisdiction due process test employed by this circuit. *Compare Deutsch*, 497 P.2d at 1314 *with Haisten*, 784 F.2d at 1397. We therefore conclude that the Washington long-arm statute imposes no limitations beyond those imposed by due process.

or 'continuous and systematic' contacts with the forum state." *Fields*, 796 F.2d at 301 (quoting *Haisten*, 784 F.2d at 1396). A court exercising general jurisdiction over a defendant may hear cases unrelated to the defendant's forum-related activities. *Id.*

The level of contact with the forum state necessary to establish general jurisdiction is quite high. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (no jurisdiction over foreign corporation that sent officers to forum for a negotiating session, accepted checks drawn from a forum bank, purchased equipment from the forum, and sent personnel to the forum to be trained); *Cubbage*, 744 F.2d at 667-68 (no general jurisdiction over non-resident doctors despite significant number of patients in forum, use of forum's state medical insurance system and telephone directory listing that reached forum); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (no general jurisdiction over defendants despite several visits and purchases in forum, solicitation of contract in forum which included choice of law provision favoring forum, and extensive communication with forum), *cert. denied*, 471 U.S. 1066 (1985); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242-43 (9th Cir. 1984) (foreign corporation's sales and marketing efforts in forum state, including solicitation of orders, promotion of products to potential customers through the mail and through showroom displays, and attendance at trade shows and sales meetings, were insufficient contact to assert general jurisdiction).

Carnival's contacts with the State of Washington are insufficient to support an exercise of general jurisdiction. Carnival has no offices and no exclusive agents in Washington, it is not registered to do business there, and it pays no taxes there. These factors militate against the exercise of general jurisdiction. *See Fields*, 796 F.2d at 302. Its contacts are limited to advertising in the local media, the mailing of brochures and the payment of commissions to travel agents, the conducting of promotional seminars, and the sale of its vacation cruises to residents of Washington. Only 1.29% and 1.06% of Carnival's cruise business was derived from residents of Washington in 1985 and 1986, respectively. This court has held under somewhat similar facts that the exercise of general jurisdiction would violate due process. *See Congoleum*, 729 F.2d at 1243.

If the non-resident defendant's activities within the forum are not sufficiently pervasive to justify the exercise of general jurisdiction, a court may nevertheless assert jurisdiction for a cause of action arising out of the defendant's activities within the forum. The Ninth Circuit has devised a three-part test to determine whether the exercise of this "specific" jurisdiction comports with due process: (1) The defendant must have done some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Haisten*, 784 F.2d at 1397; *Data Disc*, 557 F.2d at 1287.

1. *Purposeful Availment*

Purposeful availment requires that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 840 (9th Cir. 1986). This focus upon the affirmative conduct of the defendant is designed to ensure that the defendant is not haled into court as the result of random, fortuitous or attenuated contacts, or on account of the unilateral activities of third parties. *See e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (purchaser's unilateral act of bringing defendant's product into

the forum state provides an insufficient basis for the exercise of personal jurisdiction over the defendant).

This circuit has held that a non-resident defendant's act of soliciting business in the forum state will generally be considered purposeful availment if that solicitation results in contract negotiations or the transaction of business. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988); *Decker Coal*, 805 F.2d at 840 ("if the defendant directly solicits business in the forum state, the resulting transactions will probably constitute the deliberate transaction of business invoking the benefits of the forum state's laws").

In *Sinatra*, the plaintiff filed suit in California against Clinic La Prairie, a Swiss health clinic, for misappropriation of his name and likeness. The *National Enquirer* had done a full feature on the Clinic in exchange for Clinic officials' agreement to make false statements regarding Frank Sinatra's alleged stay at the Clinic. Sinatra had never visited the Clinic. The court ruled that the Clinic's advertisements in the forum state, coupled with its misappropriation of Sinatra's name through the *Enquirer* article, were sufficiently directed toward the forum to satisfy the purposeful availment prong of the *Data Disc* test. 854 F.2d at 1195-98.

The *Sinatra* court's premise that solicitation of business in the forum state will support a finding of purposeful availment has substantial support in *Asahi Metal Indus. Co. v. Superior Court of Solano County*, 480 U.S. 102 (1987). Justice O'Connor, writing for a four-Justice plurality, noted that conduct such as "designing the product for the market in the forum State, establishing channels for providing regular advice to customers in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State[,]" may evidence purposeful availment. 480 U.S. at 112. The plurality relied upon the absence of these factors to conclude

that Asahi did not purposefully avail itself of the California market. *Id.*[3]

In light of these cases, it is difficult to conclude that Carnival did not purposefully avail itself of the laws of Washington. It advertised in the local media, promoted its cruises through brochures sent to travel agents in that state, and paid a commission on sales of cruises in that state. In addition, Carnival conducted promotional seminars in Washington designed to increase its sales to residents of that state. Carnival's efforts to solicit business in Washington were more extensive than those of the defendant Clinic in *Sinatra*, which consisted of advertisements in a few periodicals circulated in California. *Sinatra*, 854 F.2d at 1196.[4]

Carnival maintains that the fact it has never "consummated" a transaction in Washington precludes a finding of purposeful availment. In Carnival's view, the fact that the ticket is issued in Florida after receipt of payment and the fact that the cruise takes place completely outside of Washington State are decisive. This misses the point. As

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[3] Justice Brennan, writing for four members of the Court, maintained that the absence of "additional conduct" such as advertisement in the forum state was irrelevant. In his view, placing the goods in the stream of commerce with the knowledge that they will reach the forum state, when considered in light of the economic benefit received from sales in the forum, is sufficient to establish purposeful availment. 480 U.S. at 117, (Brennan, J., concurring). Under this standard, it is possible that Carnival's knowledge that ticket sales were being made to Washington residents is, in itself, sufficient to establish that Carnival purposefully availed itself of the benefits and protections of Washington law. We need not reach that question, however, because Carnival engaged in three of the four types of conduct mentioned by O'Connor. We view these actions to be sufficient to meet the purposeful availment test.

[4] It should be noted, however, that in analyzing whether the defendant Clinic had directed its activities toward California, the court also considered the effects in the forum of the defendant's acts. Thus, the fact that California was the situs of the tortious injury was a factor which led the court to find purposeful availment. 854 F.2d at 1196-98. That factor is not present in this case.

the Supreme Court has explained, the reality of modern commercial life is that many transactions take place solely by mail or wire across state lines, obviating the need for physical presence in the state toward which the defendant's activities are directed. Thus, the Court has held that the physical absence of the defendant and the transaction from the forum cannot defeat the exercise of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *see also Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 907 (6th Cir. 1988), *cert. denied* 57 U.S.L.W. 3313 (U.S. Nov. 1, 1988) (No. 88-403) ("Neither the presence of the defendant in the state, nor actual contract formation need take place in the forum state for defendant to do business in that state.").

The actions taken by Carnival to solicit business within the State of Washington were clearly purposefully directed toward residents of Washington. To that extent, it is irrelevant where the tickets are issued or where the cruise takes place. In addition, Carnival's argument ignores the fact that the promotional seminars actually took place within the state. In short. Carnival's actions were more than sufficient to meet the purposeful availment test.

2. *Arising Out of*

The second prong of the three-part *Data Disc* test requires that the claim must "arise out of" the defendant's forum-related activities. Carnival maintains that the Shutes' claim, which is based on allegations of negligence with respect to conditions on the TROPICALE, does not "arise out of" Carnival's business solicitation contacts with Washington.

Carnival points to several cases outside this circuit supporting its contention that, for purposes of personal jurisdiction, "slip and fall" claims do not arise out of the defendant's business solicitation activities in the forum. *See Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d

1067 (8th Cir. 1983). *See also Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964) (plaintiff's injuries sustained while on defendant's bus tour did not arise from defendant's forum activities, where those activities consisted of ticket sale through independent travel agent in the forum).

In *Marino* the plaintiff, a resident of Massachusetts, sued Hyatt, a Delaware corporation with its principal place of business in Illinois, for injuries incurred at one of the defendant's hotels. The plaintiff had made reservations through a Massachusetts travel agent to stay at the defendant's Hyatt Regency Hotel in Maui, Hawaii. The plaintiff slipped in the bathtub of her Hawaii hotel room, sustaining injuries. The court of appeals affirmed the district court's dismissal of her ensuing personal injury claim for lack of personal jurisdiction.

Basing its decision on an interpretation of the Massachusetts long-arm statute, the court acknowledged that Hyatt transacted business in Massachusetts. However, the court concluded that the claim, stemming from Mrs. Marino's fall in the bathtub in Hawaii, did not "arise from" the reservation contract entered into in Massachusetts. 793 F.2d at 430.[5]

In *Pearrow* the plaintiff, an Arkansas resident, slipped and fell on the floor of the Hospitality Suite at Opryland USA in Nashville, Tennessee. He brought an action in Arkansas against the owner of Opryland, National Life. The district court dismissed the case for lack of jurisdiction, noting that the cause of action did not arise out of the defendant's activities in Arkansas, and that the Arkansas long-arm statute therefore provided no basis for the exercise of jurisdiction. The court of appeals affirmed.

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[5] The court distinguished *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983) (a cause of action for breach of contract arose from law school's act of sending recruiters to Massachusetts). In the court's view, a cause of action for breach of contract was distinguishable from a cause of action alleging a negligent tort.

Noting that National was registered to conduct insurance business in Arkansas, the court concluded that the plaintiff's Tennessee injury had nothing to do with that insurance business. More important, the court concluded that National's act of sending brochures into Arkansas soliciting visits to Opryland was "too tenuous" a connection to support jurisdiction. 703 F.2d at 1069.

Were this court to apply the "arising from" analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington. Rather, we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE. However, *Cubbage v. Merchent*, 744 F.2d 665, suggests that this circuit has not adopted such a stringent standard of causation in evaluating whether a court has specific jurisdiction.

In *Cubbage*, this court was faced with a medical malpractice suit brought in a federal district court in California by a California resident against two doctors and a hospital located in and licensed in Arizona. Although the doctors were not licensed to practice in California, they applied for and were issued California Medi-Cal numbers. Both doctors and the hospital were listed in a telephone directory which was distributed in the area of California lying adjacent to Arizona, and a significant number of the defendants' patients (including Cubbage) were California residents.

Applying the *Data Disc* test, the court held that the exercise of specific jurisdiction did not offend due process. Of particular relevance is the court's holding that the appellant's malpractice claim arise out of the defendant's solicitation of patients from California, 744 F.2d at 670. Had the *Cubbage* court applied reasoning similar to that utilized in the cases cited by Carnival, Cubbage's claim would have arisen out of the doctor's negligent treatment of Cubbage in Arizona, not out of the business solicitation

activities in California. In our view, *Cubbage* must be read as a rejection by this circuit of the rigid causation standard advanced by Carnival.

Decisions by at least two other courts of appeal support the view that a tort can arise from prior business solicitation in the forum state. *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir. 1988); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981). These courts apply a "but for" test of casuality in this type of situation.

Lanier involved allegations of sex discrimination in the certification procedure employed by the defendant Board. The plaintiff, a licensed Michigan dentist, sought certification by the defendant through its Chicago, Illinois headquarters. Dr. Lanier twice failed the oral examination required for certification, once in Phoenix, once in Chicago. She then filed suit in Michigan. The district court ruled that it lacked personal jurisdiction over the defendant, but the appellate court reversed.

The Sixth Circuit court first determined that the Board's contacts with the State of Michigan, which consisted of the collection of application fees from Dr. Lanier, together with a series of telephone calls and written correspondence to Dr. Lanier in Michigan, were sufficient to constitute "the transaction of any business" within the meaning of the long-arm statute. The court then considered whether the "arising out of" requirement of the long-arm statute was fulfilled. The Board argued that the plaintiff's cause of action arose from the allegedly unfairly evaluated oral examinations given in Arizona and Illinois rather than from its contacts with Dr. Lanier in Michigan. The court rejected this argument, commenting that it was "unpersuaded that the plaintiff's relationship and contacts with the defendant Board can be logically or legally fragmented in that fashion." 843 F.2d at 908.

In the court's view, the entire course of events underlying Dr. Lanier's claim was an uninterrupted whole which

began with, and was uniquely made possible by, the Board's contacts in Michigan. But for those contacts, the cause of action would never have come about.

> Whether the decision to discriminate occurred before, during, or after the oral examination administered to the plaintiff is not controlling . . . [I]t arose from, was occasioned by, and would not have occurred but for the totality of Dr. Lanier's efforts to obtain Board certification—efforts which derived, as we have held, from the defendant's limited business contacts with Dr. Lanier in Michigan.

843 F.2d at 908-09.

The Fifth Circuit expressed similar sentiments in *Prejean*. In that case, survivors of employees allegedly under contract with Sonatrach, the Algerian national oil company, brought a wrongful death action in Texas against Sontatrach, Air Algeria and Beech Aircraft Corporation. The plaintiffs alleged that their spouses, while in Algeria performing duties pursuant to a contract with Sonatrach, died when a plane chartered by Sonatrach crashed.

Applying the Texas jurisdictional statute, the district court dismissed the action as to all three defendants for want of personal jurisdiction. The court of appeals affirmed as to Air Algeria and Beech, but reversed and remanded for further discovery as to jurisdiction over Sonatrach.[6]

The key analysis for our purposes appears in footnote 21, where the court addressed Sonatrach's argument that the existence of the contract with the decedents' firm would be insufficient to satisfy the "arising from" requirement of the jurisdictional statute. Sonatrach argued that a tort suit cannot arise from a contractual contact with the

[6] The defendant disputed the existence of the only contact to the forum, the alleged contract between Sonatrach and the decedents' Dallas engineering firm. Thus, the court required more information about the possible existence of that contract.

forum. The court responded with the following observation:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious "striking distance" of one another. While the relationship between a tort suit and a contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact.

652 F.2d at 1270, n. 21.

Our circuit, in *Cubbage v. Merchent*, implicitly adopted the "but for" test in analyzing whether a cause of action arises from a defendant's continuing efforts to solicit business in the forum state. Today, we make its adoption explicit.[7] We agree with the Fifth and Sixth Circuits that the proximate cause approach of *Marino* and *Pearrow* unnecessarily limits the ordinary meaning of the "arising out of" language. Moreover, application of a "but for" standard is more consistent with cases finding jurisdiction over manufacturers of defective goods sent into a forum state. *See e.g., Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (Oregon longshoreman's negligence claim against Japanese manufacturer of defective wire rope splice held to arise from delivery of the splices into commerce). In contract, application of the *Marino* standard would compel the conclusion that such claims arise from negligence in manufacture and design, rather than from forum-related activity.

[7] We note that where a defendant has only one contact with the forum state, a close nexus between its forum-related activities and the cause of the plaintiffs' harm may be required. *See Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1983). The case before us in which defendant had engaged in significant and continuing efforts to solicit business in the forum state is more like *Cubbage*. *See Cubbage*, 747 F.2d at 665.

The "but for" test is consistent with the basic function of the "arising out of" requirement—it preserves the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be haled into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction. *See e.g., Scott v. Breeland*, 792 F.2d 925, 928 (9th Cir. 1986) (an assault on a flight attendant occurring in a plane on the ground in Reno does not arise out of a defendant's musical performances or sales of records or tapes in California); *Thos. P. Gonzalez Corp. v. Consejo Nactional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980) (visits to California by a defendant's representatives to execute formal documents in prior transactions do not support the exercise of jurisdiction over a cause of action relating to subsequent, unrelated transactions). The "but for" test preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum.

A restrictive reading of the "arising out of" requirement is not necessary in order to protect potential defendants from unreasonable assertions of jurisdiction. The third prong of the *Data Disc* test provides that protection. If the connection between the defendant's forum related activities is "too attenuated," the exercise of jurisdiction would be unreasonable, and therefore in violation of due process.

Finally, we note that adoption of the more restrictive view of the "arising out of" requirement would preclude the exercise of jurisdiction in some cases where the plaintiff has established purposeful availment through continuing efforts to solicit business, some nexus between the cause of action and the defendant's forum-related activities, and the reasonableness of requiring the defendant to defend in the forum. Such an approach would represent an unwarranted departure from the core concepts of

"fair play and substantial justice" which are central to due process analysis in the context of the exercise of personal jurisdiction.

Applying the *Cubbage standard*, we conclude that the Shutes' cause of action arose out of Carnival's contacts with Washington. The evidence is clear that Carnival's solicitation of business in Washington attracted the Shutes (through their travel agent) to the Carnival cruise. In the absence of Carnival's activity, the Shutes would not have taken the cruise, and Mrs. Shute's injury would not have occurred. It was Carnival's forum-related activities that put the parties within "tortious striking distance" of one another.

3. *Reasonableness*

After the first two prongs of the *Data Disc* test have been met, the court still must determine whether the exercise of jurisdiction over Carnival would be reasonable. In determining reasonableness, this circuit examines seven factors: the extent of purposeful interjection; the burden on the defendant to defend the suit in the chosen forum; the extent of conflict with the sovereignty of the defendant's state; the forum state's interest in the dispute; the most efficient forum for judicial resolution of the dispute; the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative forum. *Federal Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1442 (9th Cir. 1987). The court must balance the seven factors to determine whether the exercise of jurisdiction would be reasonable. *Id.*

Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant "must present a compelling case" that the exercise of jurisdiction would, in fact, be unreasonable. *Burger King*, 471

U.S. at 476; *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 790 (9th Cir. 1987).

Carnival does not attempt to rebut the reasonableness of the exercise of jurisdiction through an analysis of the seven factors. Rather, Carnival's main argument is that litigation in Washington was not reasonably foreseeable because the passenger contract required suit to be brought in Florida, and because the contract for the cruise and the cruise itself were "consummated" outside of Washington. The latter argument is the same one raised and rejected in analyzing the purposeful availment requirement. The former ignores the fact that Carnival, by its business solicitation activities, has injected itself into the forum. Carnival has provided no authority for the view that a forum selection clause can be used to defeat jurisdiction of another state where exercise of that jurisdiction would otherwise be reasonable. An analysis of the seven factors used by this circuit suggests that jurisdiction over Carnival is reasonable in this case.

Extent of Purposeful Interjection

This factor is closely tied to the issue of purposeful availment analyzed above. Recent cases indicate that this factor is no longer given any weight once it is shown that the defendant purposefully directed its activities toward the forum state. *Melcher*, 824 F.2d at 790.

Burden on the Defendant

Although the defendant would prefer to litigate in Florida, in light of modern advances in transportation and communications, the burden of defending this suit in Washington would not be overwhelming. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986). Moreover, this court must "examine the burden on the defendant in light of the corresponding burden on the plaintiff." *Sinatra*, 854 F.2d at 1199; *Brand*, 796 F.2d

at 1075. It would be at least as burdensome for the Shutes to pursue this action in Florida as it would for Carnival to defend it in Washington.

This circuit recognizes that once minimum contacts have been established, inconvenience to the defendant is more appropriately handled not as a challenge to jurisdiction, but as a factor supporting a change in venue. *Sinatra*, 854 F.2d at 1199; *Hirsch*, 800 F.2d at 1481. Any inconvenience suffered by Carnival surely would not be so great as to constitute a deprivation of due process. *See e.g., Sinatra*, 854 F.2d at 1199 (inconvenience to Swiss Clinic with one representative in the U.S. of defending lawsuit in California not so great as to constitute due process violation). Thus, this factor does not strongly favor dismissal.

Conflict With Sovereignty of Defendant's State

This factor is not dispositive here. The Supreme Court has noted that litigation against an alien defendant creates a higher jurisdictional barrier due to additional sovereignty concerns. *Asahi*, 480 U.S. at 115. However, despite the fact that Carnival is a Panamanian corporation, its principal place of business is in Florida. It asserts that Florida is the proper forum for this dispute. Therefore it is the possible conflict with Florida's sovereignty which is of concern here. In this type of situation, this circuit has stated that choice-of-law rules, rather than jurisdictional rules, are more appropriate to accommodate conflicting sovereignty interests. *Hirsch*, 800 F.2d at 1482.

Forum State's Interest in Adjudicating the Dispute

A state is deemed to have a strong interest in protecting its citizens against the tortious acts of others. *Cubbage*, 744 F.2d at 671. This interest continues even where the injury occurs outside the forum state's territorial limits. *Id.* (California has a manifest interest in

protecting its citizens from tortious injury from health care providers who solicit patients from the state).

Efficient Judicial Resolution

This factor appears to favor the exercise of jurisdiction. Although the injury occurred in international waters off the coast of Mexico, the Shutes, their health care provider, and at least one of the witnesses to the accident all reside in Washington. At least one other witness resides in California, and it is unclear where other possible witnesses reside. As between Washington and Florida, the two states which are capable of exercising jurisdiction, Washington is the more efficient forum.

Convenience and Effectiveness of Relief for Plaintiff

The record indicates that the physical and financial burdens placed upon the Shutes by being forced to pursue this suit in Florida would be substantial. Dismissal of this suit from Washington effectively may prevent the Shutes from obtaining relief. This factor weighs heavily in favor of the exercise of jurisdiction. *Hirsch*, 800 F.2d at 1481.

Existence of an Alternative Forum

Carnival suggests that Florida is an available alternative forum, and the Shutes do not dispute this. However, in light of the practical difficulites noted in the discussions of efficient forum and convenience to plaintiffs, this factor cannot be said to weigh heavily in favor of dismissal.

We conclude that, on balance, these factors favor the exercise of jurisdiction. Certainly, Carnival has not presented a compelling case that the exercise of jurisdiction would be unreasonable. We therefore find that the Shutes have established personal jurisdiction over Carnival in Washington.

III. *The Effect of the Forum Selection Clause*

Carnival contends that even if it is subject to personal jurisdiction in Washington, the district court was required under 28 U.S.C. § 1406(a) to dismiss this action, or to transfer this action to a court located in Florida pursuant to the forum selection provision of the passenger ticket contract.[8] The Shutes argue that the forum selection provision is unreasonable, and should not be enforced in this case. Because of the parties' disparity in bargaining power and the impact of enforcing the forum selection provision on the Shutes' ability to pursue their case on the merits, we find that application of the forum selection provision would be unreasonable in this case.

Federal law governs the validity of the forum selection clause. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, No. 87-1988, slip op. at 12141 (9th Cir. Sept. 28, 1988). Thus, the starting point for analysis is the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).[9] *The Bremen* dealt with a contract

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[8] Although the district court did not reach this issue, both parties request that, in the interest of judicial economy, this court determine the applicability of the forum selection provision on appeal, rather than remanding to the district court. Because some of the factual issues are similar to those raised in the jurisdiction context, and because the record is sufficiently well-developed, we can decide the forum selection issue efficiently.

[9] In *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988) the Court held that the enforceability of a forum selection clause is only one of the factors to consider in making a 28 U.S.C. § 1404 transfer decision. '[T]he immediate issue before the district court was whether to grant respondent's motion to transfer the action under § 1404(a).' 108 S. Ct. at 2243. Carnival made no such motion in this case. Rather, Carnival argued solely on the basis of its forum selection clause that venue was improper, and that the case should therefore be dismissed or transferred pursuant to 28 U.S.C. § 1406(a). As this circuit noted in *Manetti-Farrow*, *Stewart* is inapplicable to such motions, and the analysis of *The Bremen* is controlling. 858 F.2d at 512-12 n.2.

between an American corporation, Zapata, and a German corporation, Unterweser, for Unterweser to tow a Zapata oil rig from Louisiana to a point in the Adriatic Sea off Ravenna, Italy. The contract provided that any dispute arising from the contract be brought before the London Court of Justice. The rig was damaged while in the Gulf of Mexico, and Zapata brought suit in a federal district court in Florida. The Fifth Circuit affirmed the district court's denial of Unterweser's motion to dismiss, but the Supreme Court reversed.

The Court held that forum selection clauses are *prima facie* valid. 407 U.S. at 10; *see also Manetti-Farrow*, slip op. at 12144. Such a clause should not be set aside unless the party challenging it can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *The Bremen*, 407 U.S. at 15. *See also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984) (absent some evidence submitted by the party opposing enforcement of the clause indicating fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties). However, *The Bremen* involved a large, complex commercial contract between two sophisticated parties. There was no evidence in *The Bremen* that the parties were in an unequal bargaining position. 407 U.S. at 12-13, and n.14 ("this was not simply a form contract with boilerplate language that Zapata had no power to alter").

Although some courts have upheld analogous provisions contained in passenger ticket contracts,[10] in our view the

[10] For example, in *Carpenter v. Klosters Rederi A/S*, 604 F.2d 111 (5th Cir. 1979), the Fifth Circuit upheld a contractual time limitation for initiating suit that was included in a passenger contract ticket. The court focused entirely upon whether the passenger

evidence in this case suggests the sort of disparity in bargaining power that justifies setting aside the forum selection provision. First, there is no evidence that the provision was freely bargained for. To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis. *See Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) (applying Oregon law, the court found that a take-it-or-leave-it clause in a form contract is the type of unfair or unreasonable clause that should be invalidated); *Yoder v. Heinhold Commodities, Inc.*, 630 F.Supp. 756, 759 (E.D. Va. 1986) (inequality of bargaining power and use of form contracts are important factors in determining whether to enforce a forum selection clause); *Galli v. Travelhost, Inc.*, 603 F.Supp. 1260, 1263 (D. Nev. 1985) (court refused to enforce forum selection clause where evidence indicated that the clause was not freely bargained for). Even if we assume that the Shutes had notice of the provision,[11] there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not freely bargained for, we hold that it does not represent the express intent of the parties, and should not receive the deference generally accorded to such provisions.[12]

received adequate notice. The court did not address whether application of the time limitation was reasonable.

[11] This itself is doubtful, as the Shutes apparently did not have an opportunity to review the terms and conditions printed on the ticket until after the ticket was printed in Florida and mailed to them in Washington. Thus, the transaction was completed before the Shutes ever saw the ticket's terms and conditions.

[12] Plaintiff also suggested that enforcement of the forum selection clause was barred by 46 U.S.C. § 183(c), which provides that it is unlawful for vessel owners "to insert in any . . . contract, or agreement any provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by a court of competent jurisdiction on the question of liability for such loss

The fact that enforcement of the clause in this case would "be so gravely difficult and inconvenient" that the plaintiffs would "for all practical purposes be deprived of [their] day in court," *The Bremen*, 407 U.S. at 18, provides an independent justification for refusal to enforce the forum selection clause. *See Yoder*, 630 F.Supp. at 759; *Carefree Vacations, Inc. v. Brunner*, 615 F.Supp. 211, 214 (W.D. Tenn. 1985) (inconvenience and lack of relationship between chosen forum and transaction in dispute sufficient to establish that forum selection clause is unreasonable). As we noted in analyzing the reasonableness of subjecting Carnival to suit in Washington, enforcement of the forum selection clause would be greatly inconvenient to the plaintiffs and witnesses. There is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida. We therefore decline to hold that the forum selection clause requires that this action be dismissed or transferred pursuant to 28 U.S.C. § 1406(a).

IV. *Conclusion*

We find that exercise of jurisdiction in Washington to be consistent with principles of due process. We also find the forum selection clause requiring suit to be brought in Florida to be unenforceable in these circumstances. This case is therefore REVERSED and REMANDED.

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or injury, or the measure of damages therefor. All such agreements . . . shall be null and void and of no effect." Because we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of this statute on forum selection agreements. We do note, however, that this statute exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners, and the need for independent examination of the fairness of this type of contract.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4063

D.C. No. CIV-86-1204-D

EULALA SHUTE, and RUSSEL SHUTE,
Plaintiffs-Appellants,

v.

CARNIVAL CRUISE LINES,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
October 5, 1988—San Francisco, California

Filed December 12, 1988

Before: Betty B. Fletcher, Robert Boochever and
Stephen S. Trott, Circuit Judges

Opinion by Judge Fletcher

OPINION

Gregory J. Wall, Brousseau, Wall & Jankovich, Seattle, Washington, for the plaintiffs-appellants.

Jonathan Rodriguez-Atkatz, Bogle & Gates, Seattle, Washington, for the defendant-appellee.

FLETCHER, Circuit Judge:

Plaintiffs Eulala and Russell Shute appeal the district court's decision to grant the defendant's motion for summary judgment, dismissing their suit for damages. The district court granted the motion on the grounds that the defendant's forum-related activities were insufficient to support the exercise of personal jurisdiction in a manner consistent with due process. We reverse.

BACKGROUND

The defendant-appellee, Carnival Cruise Lines, is a Panamanian corporation with its principal place of business in Miami, Florida. It is undisputed that Carnival is not registered to do business in the State of Washington. It owns no property in Washington, maintains no office or bank account in Washington and pays no business taxes in Washington. It has never operated ships which have called at Washington ports. It has no exclusive agent in Washington. Carnival does, however, advertise its cruises in local Washington newspapers. It also provides brochures to travel agents in Washington, which in turn are distributed to potential customers. Carnival also periodically holds seminars for travel agents in the State of Washington to inform them about, and encourage them to sell, Carnival cruises. Carnival pays travel agencies a 10% commission on proceeds from tickets sold for Carnival cruises.

The plaintiff-appellants, who are Washington residents, purchased tickets through Smokey Point Travel in Arlington, Washington for a seven day cruise on a Carnival Cruise Lines ship, the TROPICALE. The appellants were to embark in Los Angeles, California, sailing from there to Puerto Vallarta, Mexico. The tickets were purchased through the travel agent, who forwarded payment to Carnival in Miami. The tickets were issued in Florida, then forwarded to the appellants in Washington.

The passage contract ticket contained a forum selection clause that provided as follows:

> It is agreed by and between the passengers and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the courts of any other state or country.

The appellants' cause of action arises from injuries suffered by Mrs. Shute when she slipped on a deck mat while on a guided tour of the ship's galley. This incident occurred in international waters off the coast of Mexico. The Shutes allege that the fall was due to the negligence of Carnival and its employees, and request damages arising out of personal injuries to Mrs. Shute.

Carnival moved for summary judgment on two grounds: first, that the district court lacked personal jurisdiction over Carnival; and second, that the passenger ticket contract required the Shutes to bring all claims against Carnival in the Florida courts. In the alternative, Carnival requested a transfer of the case to the U.S. District Court for the Southern District of Florida. The court addressed only the first issue, ruling that it lacked personal jurisdiction over Carnival. The Shutes timely appeal.

DISCUSSION

I. *Burden of Proof/Standard of Review*

The plaintiff has the burden of establishing that the court has personal jurisdiction. *Cubbage v. Merchent*,

744 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). Where the trial court's ruling is based solely upon a review of affidavits and discovery materials, dismissal is appropriate only if the plaintiff fails to make a *prima facie* showing of personal jurisdiction. *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986); *Data Disc, Inc. v. Systems Tech. Assoc.*, 557 F.2d 1280, 1285-86 (9th Cir. 1977). *Cf. Haisten v. Grass Valley Med. Reimbursement Fund*, 784 F.2d 1392, 1396, n.1 (9th Cir. 1986) (where defendant challenges judgment entered against it on the merits, the plaintiff bears the full burden of proof of personal jurisdiction by the preponderance of the evidence).

A district court's determination that personal jurisdiction can properly be exercised is a question of law reviewable *de novo* when the underlying facts are undisputed. *Haisten*, 784 F.2d at 1396. For the purposes of this appeal, we treat the plaintiffs' allegations as correct. *Fields*, 796 F.2d at 301.

II. *Personal Jurisdiction*

This action was brought in admiralty in the U.S. District Court for the Western District of Washington. In order to establish personal jurisdiction, the Shutes must demonstrate that the forum state's jurisdictional statute confers personal jurisdiction, and that the exercise of jurisdiction accords with federal constitutional principles of due process. *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985).

Washington's jurisdictional statute provides, in relevant part, as follows:

> (1) Any person whether or not a citizen or resident of this state, who, in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of said acts: (a) the transaction of any business within the state . . . .

Wash. Rev. Code 4.28.185. (West 1988). This statute has been construed by the Supreme Court of Washington to permit the assertion of jurisdiction to the extent permitted by due process, except where limited by the terms of the statute. *Deutsch v. West Coast Machinery Co.*, 80 Wash.2d 707, 497 P.2d 1311 (1972). For our purposes, "the statutory and constitutional standards merge into a single due process test." *Pedersen Fisheries, Inc. v. Patti Industries*, 563 F.Supp. 72, 74 (W.D. Wash. 1983).[1]

Considerations of due process require that non-resident defendants have certain minimum contacts with the forum state, so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). However, the nature and quality of the necessary contacts required vary, depending upon the type of jurisdiction asserted.

Courts may exercise either general or specific jurisdiction over non-resident defendants. General jurisdiction exists where the non-resident defendant has " 'substantial' or 'continuous and systematic' contacts with the forum state." *Fields*, 796 F.2d at 301 (quoting *Haisten*, 784 F.2d at 1396). A court exercising general jurisdiction over a defendant may hear cases unrelated to the defendant's forum-related activities. *Id.*

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[1] Where jurisdiction is asserted under § 4.28.185(1)(a), the "transaction of any business" provision, the Washington courts apply a three factor test that is virtually identical to the specific jurisdiction due process test employed by this circuit. *Compare Deutsch*, 497 P.2d at 1314 *with Haisten*, 784 F.2d at 1397. We therefore conclude that the Washington long-arm statute imposes no limitation beyond those imposed by due process.

The level of contact with the forum state necessary to establish general jurisdiction is quite high. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984) (no jurisdiction over foreign corporation that sent officers to forum for a negotiating session, accepted checks drawn from a forum bank, purchased equipment from the forum, and sent personnel to the forum to be trained); *Cubbage*, 744 F.2d at 667-68 (no general jurisdiction over non-resident doctors despite significant number of patients in forum, use of forum's state medical insurance system and telephone directory listing that reached forum); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (no general jurisdiction over defendants despite several visits and purchases in forum, solicitation of contract in forum which included choice of law provision favoring forum, and extensive communication with forum), *cert. denied*, 471 U.S. 1066 (1985); *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242-43 (9th Cir. 1984) (foreign corporation's sales and marketing efforts in forum state, including solicitation of orders, promotion of products to potential customers through the mail and through showroom displays, and attendance at trade shows and sales meetings, were insufficient contact to assert general jurisdiction).

Carnival's contacts with the State of Washington are insufficient to support an exercise of general jurisdiction. Carnival has no offices and no exclusive agents in Washington, it is not registered to do business there, and it pays no taxes there. These factors militate against the exercise of general jurisdiction. *See Fields*, 796 F.2d at 302. Its contacts are limited to advertising in the local media, the mailing of brochures and the payment of commissions to travel agents, the conducting of promotional seminars, and the sale of its vacation cruises to residents of Washington. Only 1.29% and 1.06% of Carnival's cruise business was derived from residents of Washington in 1985 and 1986, respectively. This court has held

under somewhat similar facts that the exercise of general jurisdiction would violate due process. *See Congoleum*, 729 F.2d at 1243.

If the non-resident defendant's activities within the forum are not sufficiently pervasive to justify the exercise of general jurisdiction, a court may nevertheless assert jurisdiction for a cause of action arising out of the defendant's activities within the forum. The Ninth Circuit has devised a three-part test to determine whether the exercise of this "specific" jurisdiction comports with due process: (1) The defendant must have done some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Haisten*, 784 F.2d at 1397; *Data Disc*, 557 F.2d at 1287.

1. *Purposeful Availment*

Purposeful availment requires that the defendant engage in some form of affirmative conduct allowing or promoting the transaction of business within the forum state. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 840 (9th Cir. 1986). This focus upon the affirmative conduct of the defendant is designed to ensure that the defendant is not hailed into court as a result of random, fortuitous or attenuated contacts, or on account of the unilateral activities of third parties. *See e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (purchaser's unilateral act of bringing defendant's product into the forum state provides an insufficient basis for the exercise of personal jurisdiction over the defendant).

This circuit has held that a non-resident defendant's act of soliciting business in the forum state will gerally be considered purposeful availment if that solici-

tation results in contract negotiations or the transaction of business. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988); *Decker Coal*, 805 F.2d at 840 ("if the defendant directly solicits business in the forum state, the resulting transactions will probably constitute the deliberate transaction of business invoking the benefits of the forum state's laws").

In *Sinatra*, the plaintiff filed suit in California against Clinic La Prairie, a Swiss health clinic, for misappropriation of his name and likeness. The *National Enquirer* had done a full feature on the Clinic in exchange for Clinic officials' agreement to make false statements regarding Frank Sinatra's alleged stay at the Clinic. Sinatra had never visited the Clinic. The court ruled that the Clinic's advertisements in the forum state, coupled with its misappropriation of Sinatra's name through the *Enquirer* article, were sufficiently directed toward the forum to satisfy the purposeful availment prong of the *Delta Disc* test. 854 F.2d at 1195-98.

The *Sinatra* court's premise that solicitation of business in the forum state will support a finding of purposeful availment has substantial support in *Asahi Metal Indus. Co. v. Superior Court of Solano County*, 480 U.S. 102 (1987). Justice O'Connor, writing for a four-Justice plurality, noted that conduct such as "designing the product for the market in the forum State, establishing channels for providing regular advice to customers in the forum State, advertising in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State[,]" may evidence purposeful availment. 480 U.S. at 112. The plurality relied upon the absence of these factors to conclude that Asahi did not purposefully avail itself of the California market. *Id.*[2]

[2] Justice Brennan, writing for four members of the Court, maintained that the absence of "additional conduct" such as advertisement in the forum state was irrelevant. In his view, placing the goods in the stream of commerce with the knowledge that they will reach the forum state, when considered in light of the economic benefit received from sales in the forum, is sufficient to establish purposeful availment. 480 U.S. at 117, (Brennan, J., concurring). Under this standard, it is possible that Carnival's knowledge that ticket sales were being made to Washington residents is, in itself, sufficient to establish that Carnival purposefully availed itself of the benefits and protections of Washington law. We need not reach that question, however, because Carnival engaged in three of the four types of conduct mentioned by O'Connor. We view these actions to be sufficient to meet the purposeful availment test.

In light of these cases, it is difficult to conclude that Carnival did not purposefully avail itself of the laws of Washington. It advertised in the local media, promoted its cruises through brochures sent to travel agents in that state, and paid a commission on sales of cruises in that state. In addition, Carnival conducted promotional seminars in Washington designed to increase its sales to residents of that state. Carnival's efforts to solicit business in Washington were more extensive than those of the defendant Clinic in *Sinatra*, which consisted of advertisements in a few periodicals circulated in California. *Sinatra*, 854 F.2d at 1196.[3]

Carnival maintains that the fact it has never "consummated" a transaction in Washington precludes a finding of purposeful availment. In Carnival's view, the fact that the ticket is issued in Florida after receipt of payment and the fact that the cruise takes place completely outside of Washington State are decisive. This misses the point. As the Supreme Court has explained, the reality of modern commercial life is that many transactions take place solely by mail or wire across state lines, obviating the need for physical presence in the

[3] It should be noted, however, that in analyzing whether the defendant Clinic had directed its activities toward California, the court also considered the effects in the forum of the defendant's acts. Thus, the fact that California was the situs of the tortious injury was a factor which led the court to find purposeful availment. 854 F.2d at 1196-98. That factor is not present in this case.

state toward which the defendant's activities are directed. Thus, the Court has held that the physical absence of the defendant and the transaction from the forum cannot defeat the exercise of personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *see also Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 907 (6th Cir. 1988), *cert. denied* 57 U.S.L.W. 3313 (U.S. Nov. 1, 1988) (No. 88-403) ("Neither the presence of the defendant in the state, nor actual contract formation need take place in the forum state for defendant to do business in that state.").

The actions taken by Carnival to solicit business within the State of Washington were clearly purposefully directed toward residents of Washington. To that extent, it is irrelevant where the tickets are issued or where the cruise takes place. In addition, Carnival's argument ignores the fact that the promotional seminars actually took place within the state. In short, Carnival's actions were more than sufficient to meet the purposeful availment test.

2. *Arising Out Of*

The second prong of the three-part *Data Disc* test requires that the claim must "arise out of" the defendant's forum-related activities. Carnival maintains that the Shutes' claim, which is based on allegations of negligence with respect to conditions on the TROPICALE, does not "arise out of" Carnival's business solicitation contacts with Washington.

Carnival points to several cases outside this circuit supporting its contention that, for purposes of personal jurisdiction, "slip and fall" claims do not arise out of the defendant's business solicitation activities in the forum. *See Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983). *See also Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d

Cir. 1964) (plaintiff's injuries sustained while on defendant's bus tour did not arise from defendant's forum activities, where those activities consisted of ticket sale through independent travel agent in the forum).

In *Marino* the plaintiff, a resident of Massachusetts, sued Hyatt, a Delaware corporation with its principal place of business in Illinois, for injuries incurred at one of the defendant's hotels. The plaintiff had made reservations through a Massachusetts travel agent to stay at the defendant's Hyatt Regency Hotel in Maui, Hawaii. The plaintiff slipped in the bathtub of her Hawaii hotel room, sustaining injuries. The court of appeals affirmed the district court's dismissal of her ensuing personal injury claim for lack of personal jurisdiction.

Basing its decision on an interpretation of the Massachusettss long-arm statute, the court acknowledged that Hyatt transacted business in Massachusetts. However, the court concluded that the claim, stemming from Mrs. Marino's fall in the bathtub in Hawaii, did not "arise from" the reservation contract entered into in Massachusetts. 793 F.2d at 430.[4]

In *Pearrow* the plaintiff, an Arkansas resident, slipped and fell on the floor of the Hospitality Suite at Opryland USA in Nashville, Tennessee. He brought an action in Arkansas against the owner of Opryland, National Life. The district court dismissed the case for lack of jurisdiction, noting that the cause of action did not arise out of the defendant's activities in Arkansas, and that the Arkansas long-arm statute therefore provided no basis for the exercise of jurisdiction. The court of appeals affirmed.

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[4] The court distinguished *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983) (a cause of action for breach of contract arose from law school's act of sending recruiters to Massachusetts). In the court's view, a cause of action for breach of contract was distinguishable from a cause of action alleging a negligent tort.

Noting that National was registered to conduct insurance business in Arkansas, the court concluded that the plaintiff's Tennessee injury had nothing to do with that insurance business. More important, the court concluded that National's act of sending brochures into Arkansas soliciting visits to Opryland was "too tenuous" a connection to support jurisdiction. 703 F.2d at 1069.

Were this court to apply the "arising from" analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington. Rather, we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE. However, *Cubbage v. Merchent*, 744 F.2d 665, suggests that this circuit has not adopted such a stringent standard of causation in evaluating whether a court has specific jurisdiction.

In *Cubbage*, this court was faced with a medical malpractice suit brought in a federal district court in California by a California resident against two doctors and a hospital located in and licensed in Arizona. Although the doctors were not licensed to practice in California, they applied for and were issued California Medi-Cal numbers. Both doctors and the hospital were listed in a telephone directory which was distributed in the area of California lying adjacent to Arizona, and a significant number of the defendants' patients (including Cubbage) were California residents.

Applying the *Data Disc* test, the court held that the exercise of specific jurisdiction did not offend due process. Of particular relevance is the court's holding that the appellant's malpractice claim arose out of the defendant's solicitation of patients from California, 744 F.2d at 670. Had the *Cubbage* court applied reasoning similar to that utilized in the cases cited by Carnival, Cubbage's claim would have arisen out of the doctor's negligent treatment

of Cubbage in Arizona, not out of the business solicitation activities in California. In our view, *Cubbage* must be read as a rejection by this circuit of the rigid causation standard advanced by Carnival.

Decisions by at least two other courts of appeal support the view that a tort can arise from prior business solicitation in the forum state. *Lanier v. American Bd. of Endodontics*, 843 F.2d 901; *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981). These courts apply a "but for" test of causality in this type of situation.

Lanier involved allegations of sex discrimination in the certification procedure employed by the defendant Board. The plaintiff, a licensed Michigan dentist, sought certification by the defendant through its Chicago, Illinois headquarters. Dr. Lanier twice failed the oral examination required for certification, once in Phoenix, once in Chicago. She then filed suit in Michigan. The district court ruled that it lacked personal jurisdiction over the defendant, but the appellate court reversed.

The Sixth Circuit court first determined that the Board's contacts with the State of Michigan, which consisted of the collection of application fees from Dr. Lanier, together with a series of telephone calls and written correspondence to Dr. Lanier in Michigan, were sufficient to constitute "the transaction of any business" within the meaning of the long-arm statute. The court then considered whether the "arising out of" requirement of the long-arm statute was fulfilled. The Board argued that the plaintiff's cause of action arose from the allegedly unfairly evaluated oral examinations given in *Arizona* and Illinois rather than from its contacts with Dr. Lanier in Michigan. The court rejected this argument, commenting that it was "unpersuaded that the plaintiff's relationship and contacts with the defendant Board can be logically or legally fragmented in that fashion." 843 F.2d at 908.

In the court's view, the entire course of events underlying Dr. Lanier's claim was an uninterrupted whole which began with, and was uniquely made possible by, the Board's contacts in Michigan. But for those contacts, the cause of action would never have come about.

> Whether the decision to discriminate occurred before, during, or after the oral examination administered to the plaintiff is not controlling . . . [I]t arose from, was occasioned by, and would not have occurred but for the totality of Dr. Lanier's efforts to obtain Board certification—efforts which derived, as we have held, from the defendant's limited business contacts with Dr. Lanier in Michigan.

843 F.2d at 908-09.

The Fifth Circuit expressed similar sentiments in *Prejean*. In that case, survivors of employees allegedly under contract with Sonatrach, the Algerian national oil company, brought a wrongful death action in Texas against Sonatrach, Air Algeria and Beech Aircraft Corporation. The plaintiffs alleged that their spouses, while in Algeria performing duties pursuant to a contract with Sonatrach, died when a plane chartered by Sonatrach crashed.

Applying the Texas jurisdictional statute, the district court dismissed the action as to all three defendants for want of personal jurisdiction. The court of appeals affirmed as to Air Algeria and Beech, but reversed and remanded for further discovery as to jurisdiction over Sonatrach.[5]

The key analysis for our purposes appears in footnote 21, where the court addressed Sonatrach's argument that the existence of the contract with the decedents' firm

[5] The defendant disputed the existence of the only contact to the forum, the alleged contract between Sonatrach and the decedents' Dallas engineering firm. Thus, the court required more information about the possible existence of that contract.

would be insufficient to satisfy the "arising from" requirement of the jurisdictional statute. Sonatrach argued that a tort suit cannot arise from a contractual contact with the forum. The court responded with the following observation:

> Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a "but for" causative factor for the tort since it brought the parties within tortious "striking distance" of one another. While the relationship between a tort suit and a contractual contact is certainly more tenuous than when a tort suit arises from a tort contact, that only goes to whether the contact is by itself sufficient for due process, not whether the suit arises from the contact.

652 F.2d at 1270, n. 21.

Our circuit, in *Cubbage v. Merchent*, implicitly adopted the "but for" test in analyzing whether a cause of action arises from a defendant's forum related activities. Today, we make its adoption explicit. We agree with the Fifth and Sixth Circuits that the proximate cause approach of *Marino* and *Pearrow* unnecessarily limits the ordinary meaning of the "arising out of" language. Moreover, application of a "but for" standard is more consistent with cases finding jurisdiction over manufacturers of defective goods sent into a forum state. *See e.g., Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1358 (9th Cir. 1983) (Oregon longshoreman's negligence claim against Japanese manufacturer of defective wire-rope splice held to arise from delivery of the splices into commerce). In contrast, application of the *Marino* standard would compel the conclusion that such claims arise from negligence in manufacture and design, rather than from forum-related activity.

The "but for" test is consistent with the basic function of the "arising out of" requirement—it preserves

the essential distinction between general and specific jurisdiction. Under this test, a defendant cannot be hailed into court for activities unrelated to the cause of action in the absence of a showing of substantial and continuous contacts sufficient to establish general jurisdiction. *See e.g., Scott v. Breeland*, 792 F.2d 925, 928 (9th Cir. 1986) (an assault on a flight attendant occurring in a plane on the ground in Reno does not arise out of a defendant's musical performances or sales of records or tapes in California); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980) (visits to California by a defendant's representatives to execute formal documents in prior transactions do not support the exercise of jurisdiction over a cause of action relating to subsequent, unrelated transactions). The "but for" test preserves the requirement that there be some nexus between the cause of action and the defendant's activities in the forum.

A restrictive reading of the "arising out of" requirement is not necessary in order to protect potential defendants from unreasonable assertions of jurisdiction. The third prong of the *Data Disc* test provides that protection. If the connection between the defendant's forum related activities is "too attenuated," the exercise of jurisdiction would be unreasonable, and therefore in violation of due process.

Finally, we note that adoption of the more restrictive view of the "arising out of" requirement would preclude the exercise of jurisdiction in some cases where the plaintiff has established purposeful availment, some nexus between the cause of action and the defendant's forum-related activities, and the reasonableness of requiring the defendant to defend in the forum. Such an approach would represent an unwarranted departure from the core concepts of "fair play and substantial justice" which are central to due process analysis in the context of the exercise of personal jurisdiction.

Applying the *Cubbage* standard, we conclude that the Shutes' cause of action arose out of Carnival's contacts with Washington. The evidence is clear that Carnival's solicitation of business in Washington attracted the Shutes (through their travel agent) to the Carnival cruise. In the absence of Carnival's activity, the Shutes would not have taken the cruise, and Mrs. Shute's injury would not have occurred. It was Carnival's forum-related activities that put the parties within "tortious striking distance" of one another.

3. *Reasonableness*

After the first two prongs of the *Data Disc* test have been met, the court still must determine whether the exercise of jurisdiction over Carnival would be reasonable. In determining reasonableness, this circuit examines seven factors: the extent of purposeful interjection; the burden on the defendant to defend the suit in the chosen forum; the extent of conflict with the sovereignty of the defendant's state; the forum state's interest in the dispute; the most efficient forum for judicial resolution of the dispute; the importance of the chosen forum to the plaintiff's interest in convenient and effective relief; and the existence of an alternative forum. *Federal Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1442 (9th Cir. 1987) The court must balance the seven factors to determine whether the exercise of jurisdiction would be reasonable. *Id.*

Once purposeful availment has been established, the forum's exercise of jurisdiction is presumptively reasonable. To rebut that presumption, a defendant "must present a compelling case" that the exercise of jurisdiction would, in fact, be unreasonable. *Burger King*, 471 U.S. at 476; *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 790 (9th Cir. 1987).

Carnival does not attempt to rebut the reasonableness of the exercise of jurisdiction through an analysis of the

seven factors. Rather, Carnival's main argument is that litigation in Washington was not reasonably foreseeable because the passenger contract required suit to be brought in Florida, and because the contract for the cruise and the cruise itself were "consummated" outside of Washington. The latter argument is the same one raised and rejected in analyzing the purposeful availment requirement. The former ignores the fact that Carnival, by its business solicitation activities, has injected itself into the forum. Carnival has provided no authority for the view that a forum selection clause can be used to defeat jurisdiction of another state where exercise of that jurisdiction would otherwise be reasonable. An analysis of the seven factors used by this circuit suggests that jurisdiction over Carnival is reasonable in this case.

Extent of Purposeful Interjection

This factor is closely tied to the issue of purposeful availment analyzed above. Recent cases indicate that this factor is no longer given any weight once it is shown that the defendant purposefully directed its activities toward the forum state. *Melcher*, 824 F.2d at 790.

Burden on the Defendant

Although the defendant would prefer to litigate in Florida, in light of modern advances in transportation and communications, the burden of defending this suit in Washington would not be overwhelming. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986). Moreover, this court must "examine the burden on the defendant in light of the corresponding burden on the plaintiff." *Sinatra*, 854 F.2d at 1199; *Brand*, 796 F.2d at 1075. It would be at least as burdensome for the Shutes to pursue this action in Florida as it would for Carnival to defend it in Washington.

This circuit recognizes that once minimum contacts have been established, inconvenience to the defendant is

more appropriately handled not as a challenge to jurisdiction, but as a factor supporting a change in venue. *Sinatra*, 854 F.2d at 1199; *Hirsch*, 800 F.2d at 1481. Any inconvenience suffered by Carnival surely would not be so great as to constitute a deprivation of due process. *See e.g., Sinatra*, 854 F.2d at 1199 (inconvenience to Swiss Clinic with one representative in the U.S. of defending lawsuit in California not so great as to constitute due process violation). Thus, this factor does not strongly favor dismissal.

Conflict With Sovereignty of Defendant's State

This factor is not dispositive here. The Supreme Court has noted that litigation against an alien defendant creates a higher jurisdictional barrier due to additional sovereignty concerns. *Asahi*, 480 U.S. at 115. However, despite the fact that Carnival is a Panamanian corporation, its principal place of business is in Florida. It asserts that Florida is the proper forum for this dispute. Therefore it is the possible conflict with Florida's sovereignty which is of concern here. In this type of situation, this circuit has stated that choice-of-law rules, rather than jurisdictional rules, are more appropriate to accommodate conflicting sovereignty interests. *Hirsch*, 800 F.2d at 1482.

Forum State's Interest in Adjudicating the Dispute

A state is deemed to have a strong interest in protecting its citizens against the tortious acts of others. *Cubbage*, 744 F.2d at 671. This interest continues even where the injury occurs outside the forum state's territorial limits. *Id.* (California has a manifest interest in protecting its citizens from tortious injury from health care providers who solicit patients from the state).

Efficient Judicial Resolution

This factor appears to favor the exercise of jurisdiction. Although the injury occurred in international

waters off the coast of Mexico, the Shutes, their health care provider, and at least one of the witnesses to the accident all reside in Washington. At least one other witness resides in California, and it is unclear where other possible witnesses reside. As between Washington and Forida, the two states which are capable of exercising jurisdiction, Washington is the more efficient forum.

Convenience and Effectiveness of Relief for Plaintiff

The record indicates that the physical and financial burdens placed upon the Shutes by being forced to pursue this suit in Florida would be substantial. Dismissal of this suit from Washington effectively may prevent the Shutes from obtaining relief. This factor weighs heavily in favor of the exercise of jurisdiction. *Hirsch*, 800 F.2d at 1481.

Existence of an Alternative Forum

Carnival suggests that Florida is an available alternative forum, and the Shutes do not dispute this. However, in light of the practical difficulties noted in the discussions of efficient forum and convenience to plaintiffs, this factor cannot be said to weigh heavily in favor of dismissal.

We conclude that, on balance, these factors favor the exercise of jurisdiction. Certainly, Carnival has not presented a compelling case that the exercise of jurisdiction would be unreasonable. We therefore find that the Shutes have established personal jurisdiction over Carnival in Washington.

III. *The Effect of the Forum Selection Clause*

Carnival contends that even if it is subject to personal jurisdiction in Washington, the district court was required to transfer this action to a court located in Florida pursuant to the forum selection provision of the pas-

senger ticket contract.[6] The Shutes argue that the forum selection provision is unreasonable, and should not be enforced in this case. Because of the parties' disparity in bargaining power and the impact of enforcing the forum selection provision on the Shutes' ability to pursue their case on the merits, we find that application of the forum selection provision would be unreasonable in this case.

Federal law governs the validity of the forum selection clause. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, No. 87-1988, slip op. at 12141 (9th Cir. Sept. 28, 1988). Thus, the starting point for analysis is the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *The Bremen* dealt with a contract between an American corporation, Zapata, and a German corporation, Unterweser, for Unterweser to tow a Zapata oil rig from Louisiana to a point in the Adriatic Sea off Ravenna, Italy. The contract provided that any dispute arising from the contract be brought before the London Court of Justice. The rig was damaged while in the Gulf of Mexico, and Zapata brought suit in a federal district court in Florida. The Fifth Circuit affirmed the district court's denial of Unterweser's motion to dismiss, but the Supreme Court reversed.

The Court held that forum selection clauses are *prima facie* valid. 407 U.S. at 10; *see also Manetti-Farrow* slip op. at 12144. Such a clause should not be set aside unless the party challenging it can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *The Bremen*, 407 U.S. at 15. *See also Pelle-*

[6] Although the district court did not reach this issue, both parties request that, in the interest of judicial economy, this court determine the applicability of the forum selection provision on appeal, rather than remanding to the district court. Because some of the factual issues are similar to those raised in the jurisdiction context, and because the record is sufficiently well-developed, we can decide the forum selection issue efficiently.

port Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir. 1984) (absent some evidence submitted by the party opposing enforcement of the clause indicating fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties). However, *The Bremen* involved a large, complex commercial contract between two sophisticated parties. There was no evidence in *The Bremen* that the parties were in an unequal bargaining position. 407 U.S. at 12-13, and n.14 ("this was not simply a form contract with boilerplate language that Zapata had no power to alter").

Although some courts have upheld analogous provisions contained in passenger ticket contracts,[7] in our view the evidence in this case suggests the sort of disparity in bargaining power that justifies setting aside the forum selection provision. First, there is no evidence that the provision was freely bargained for. To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis. *See Colonial Leasing Co. v. Pugh Bros. Garage*, 735 F.2d 380, 382 (9th Cir. 1984) (applying Oregon law, the court found that a take-it-or-leave-it clause in a form contract is the type of unfair or unreasonable clause that should be invalidated); *Yoder v. Heinhold Commodities, Inc.*, 630 F.Supp. 756, 759 (E.D. Va. 1986) (inequality of bargaining power and use of form contracts are important factors in determining whether to enforce a forum selection clause); *Galli v. Travelhost, Inc.*, 603 F.Supp. 1260, 1263

[7] For example, in *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11 (5th Cir. 1979), the Fifth Circuit upheld a contractual time limitation for initiating suit that was included in a passenger contract ticket. The court focused entirely upon whether the passenger received adequate notice. The court did not address whether application of the time limitation was reasonable.

(D. Nev. 1985) (court refused to enforce forum selection clause where evidence indicated that the clause was not freely bargained for). Even if we assume that the Shutes had notice of provision,[8] there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not freely bargained for, we hold that it does not represent the expressed intent of the parties, and should not receive the deference generally accorded to such provisions.[9]

The fact that enforcement of the clause in this case would "be so gravely difficult and inconvenient" that the plaintiffs would "for all practical purposes be deprived of [their] day in court," *The Bremen*, 407 U.S. at 18, provides an independent justification for refusal to enforce the forum selection clause. *See Yoder*, 630 F.Supp. at 759; *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 214 (W.D. Tenn. 1985) (inconvenience and lack of relationship between chosen forum and transaction in dispute sufficient to establish that forum selection clause is unreasonable). As we noted in analyzing the reason-

[8] This itself is doubtful, as the Shutes apparently did not have an opportunity to review the terms and conditions printed on the ticket until after the ticket was printed in Florida and mailed to them in Washington. Thus, the transaction was completed before the Shutes ever saw the ticket's terms and conditions.

[9] Plaintiff also suggested that enforcement of the forum selection clause was barred by 46 U.S.C. § 183(c), which provides that it is unlawful for vessel owners "to insert in any . . . contract, or agreement any provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by a court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such agreements . . . shall be null and void and of no effect." Because we find that the agreement is not enforceable as a matter of public policy, we express no opinion as to the effect of this statute on forum selection agreements. We do note, however, that this statute exemplifies congressional recognition of the unequal bargaining position of passengers and vessel owners, and the need for independent examination of the fairess of this type of contract.

ableness of sujecting Carnival to suit in Washington, enforcement of the forum selection clause would be greatly inconvenient to the plaintiffs and witnesses. There is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida. We therefore decline to enforce the forum selection provision in this case.

IV. *Conclusion*

We find that exercise of jurisdiction in Washington to be consistent with principles of due process. We also find the forum selection clause requiring suit to be brought in Florida to be unenforceable in these circumstances. This case is therefore REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4063

D.C. No. CV-86-1204-D

EULALA SHUTE, and RUSSEL SHUTE,
Plaintiffs-Appellants,

v.

CARNIVAL CRUISE LINES,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington

Filed April 27, 1989

Before: Betty B. Fletcher, Robert Boochever and
Stephen S. Trott, Circuit Judges.

ORDER WITHDRAWING OPINION

The opinion in this case filed December 12, 1988 is withdrawn pending decision by the Supreme Court of Washington of a question certified to it.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Number 56089-7

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN

EULALA SHUTE and RUSSEL SHUTE,
Appellants,

v.

CARNIVAL CRUISE LINES,
Appellee.

En Banc

Filed Dec. 7, 1989

SMITH, J.—A Washington resident, injured on a cruise ship in international waters off the coast of Mexico, brought suit against the cruise operator, a Panamanian corporation with its principal place of business in Florida, under the Washington "long-arm" statute, RCW 4.28.185. The United States Court of Appeals for the Ninth Circuit certified to this court the question whether personal jurisdiction over the cruise ship operator exists under the statute. Unless limited by the terms of the statute, our courts may assert jurisdiction over nonresident defendants to the extent permitted by federal due process. We therefore answer the certified question "yes."

The sole question presented by this case is whether a claim for negligent injury occurring on an ocean cruise ship in international waters can be said, within the meaning of our state's long-arm statute, to "arise from" advertisement and promotion in Washington of its cruises by a foreign corporation.

Appellee Carnival Cruise Lines, Inc. (Carnival), is a Panamanian corporation with its principal place of business in Florida. Appellants Eulala and Russel Shute are Washington residents who purchased ocean cruise fares from Carnival through a Snohomish County travel agency in March 1986.

The cruise ship, the *M/V Tropicale*, embarked from Los Angeles, California, on April 13, 1986, en route to Mexico. On April 15, 1986, during a guided tour of the ship's galley, Mrs. Eulala Shute slipped, fell, and was injured. The ship was in international waters off the coast of Mexico at the time. The Shutes filed this case as an action in Admiralty in the United States District Court for the Western District of Washington.

The trial court, the Honorable Carolyn R. Dimmick, by order dated June 25, 1987, granted summary judgment in favor of Carnival, dismissing the claim because the cause of action did not "arise out of" or "result from" the defendant's contacts with the state of Washington.

In its opinion, issued December 12, 1988, the United States Court of Appeals for the Ninth Circuit reversed the District Court. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). Carnival moved for reconsideration. While that motion was pending, on February 5, 1989, the Washington Court of Appeals, Division One, issued its opinion in *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 767 P.2d 584 (1989), interpreting the Washington long-arm statute and finding no jurisdiction on facts comparable

to those in the Shutes' case. The United States Court of Appeals then withdrew its opinion and, by order dated April 24, 1989, certified the following question to this court:

> Would the Washington long-arm statute establish personal jurisdiction over Carnival Cruise Lines for the claim asserted by the Shutes?

Carnival's only contacts with the State of Washington consist of advertisements in Washington newspapers, promotional materials provided to Washington travel agencies, and seminars conducted by Carnival's personnel for travel agencies in promotion of its cruises. Carnival maintains no office, owns no real estate in the state of Washington, and has no Washington business license.

The tickets issued by Carnival contained contract clauses designating Florida as the forum for any litigation. They were issued in Florida and forwarded to Washington. Carnival provided neither transportation nor services to the Shutes before they boarded the *M/V Tropicale* in Los Angeles. There is no indication that the *M/V Tropicale* nor any of Carnival's other vessels has ever called at a Washington port.

The United States Court of Appeals for the Ninth Circuit concluded in this case that although due process does not permit *general jurisdiction*, it does permit *specific jurisdiction*. *Shute v. Carnival Cruise Lines*, 863 F. 2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).[1] Thus, the only inquiry remaining for this court is whether Washington's long-arm statute precludes jurisdiction on the facts of this case. *See Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 756, 757 P.2d 933 (1988).

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[1] Although an opinion which has been withdrawn has no precedential value, we agree with the reasoning of the United States Court of Appeals for the Ninth Circuit in *Shute*.

The "long-arm" statute, RCW 4.28.185(1)(a) provides in relevant part:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;

It is well established in Washington "that under the long-arm statute, RCW 4.28.185, our courts may assert jurisdiction over nonresident individuals and foreign corporations to the extent permitted by the due process clause of the United States Constitution, except as limited by the terms of the statute." *Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 711, 497 P.2d 1311, *cert. denied*, 409 U.S. 1009 (1972). We are thus asked to determine what limits are provided by the statute.

Our long-arm statute is patterned after the Illinois statute. *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 109, 381 P.2d 245 (1963). The Illinois statute "reflects on the part of the legislature 'a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause.'" *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 109, 381 P.2d 245 (1963) (quoting *Nelson v. Miller*, 11 Ill. 2d 378, 389, 143 N.E.2d 673 (1957)). *See also* E. Cleary & A. Seder, *Extended Jurisdictional Bases for the Illinois Courts*, 50 Nw. U.L. Rev. 599 (1956). The same has been said of RCW 4.28.185. *See, e.g.*, Note, *In Personam Jurisdiction Expanded—Force and Effect of Service of Process Outside of State*, 34 Wash. L. Rev. 323, 326, 329 (1959). We interpret the statute relying upon this conceptual foundation.

In order to subject nonresident defendants and foreign corporations to the *in personam* jurisdiction of this state under RCW 4.28.185(1)(a), the following factors must coincide:

> (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
>
> (2) the cause of action must arise from, or be connected with, such act or transaction; and
>
> (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Deutsch v. West Coast Mach. Co., 80 Wn.2d 707, 711, 497 P.2d 1311, (citing *Oliver v. American Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967) and *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963)), *cert. denied*, 409 U.S. 1009 (1972). In *Werner v. Werner*, 84 Wn.2d 360, 365, 526 P.2d 370 (1974), the court noted that:

> These factors are, in part, a distillation of the due process standards announced in *Interna'ional Shoe Co. v. Washington*, [326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945)], and refined in *Hanson v. Denckla*, [357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228, (1958)]; *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1950); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 96 L. Ed. 485, 72 S. Ct. 413 (1952); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957).

Thus, when the federal courts regard the due process standard and the statutory standard under RCW 4.28.185 as a single inquiry,[2] it is based upon a concept firmly rooted in our case law.

The United States Court of Appeals for the Ninth Circuit concluded that Carnival's actions were more than sufficient to satisfy the requirements of due process. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1442 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). Carnival's solicitation of business in this state was purposefully directed at Washington residents. We find this sufficient to constitute a "purposeful act" under the *first prong* of our statutory test.

The federal appellate court also concluded that "jurisdiction over Carnival is reasonable in this case." *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1446 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). We agree. Given Carnival's efforts to exploit the Washington market, we cannot say that it would offend "traditional notions of fair play and justice" for Washington to assert jurisdiction. Thus, the *third prong* of our statutory test is satisfied.

As a result of the holdings by the trial and appellate courts in *Shute* and by our Court of Appeals in *Banton*, this case turns on the *second prong* of our statutory test —whether the Shutes' claim "arises from" Carnival's promotional efforts in Washington within the meaning of RCW 4.28.185.

Our statutory test, first announced in *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963), was adapted from a law review case note. *See Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.

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[2] *E.g., Pedersen Fisheries, Inc. v. Pattie Indus. Inc.*, 563 F. Supp. 72, 74 (W.D. Wash. 1983); *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1440 n.1 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).

2d 106, 115 n.1, 381 P.2d 245 (1963). In considering whether a cause of action "arises from" a party's contacts with a forum state, the article anticipated that a "cause of action might come to fruition in another state, but because of activities of defendant in the forum state there would still be a 'substantial minimum contact.'" Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act: A New Sole for International Shoe*, 47 Geo. L.J. 342, 351 (1958). The article later stated:

> From the standpoint of fairness it should make no difference where the cause of action matured, so long as it could not have arisen *but for the activities of the nonresident firm in the forum where it is ultimately sued.*

(Italics ours.). Note, *Jurisdiction Over Nonresident Corporations Based on A Single Act: A New Sole for International Shoe*, 47 Geo. L.J. 342, 355 (1958).

The United States Court of Appeals for the Ninth Circuit adopted essentially this same "but for" analysis for the "arising from" prong of its test to determine whether the exercise of specific jurisdiction comports with due process. *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1444 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).

The "but for" test has been criticized. *See, e.g., Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986); *Russo v. Sea World of Florida, Inc.*, 709 F. Supp. 39, 42 (D.R.I. 1989). However, any criticism that the "test" reaches too far is answered by the federal court's tempering of its "but for" test with an additional consideration. "If the connection between the defendant's forum related activities [and the claim] is 'too attenuated,' the exercise of jurisdiction would be unreasonable". *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1445 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989).

While other tests or rules have been suggested, we do not consider them appropriate for adoption by this court. *See, e.g., Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971 (D. Kan. 1986) (contact must attach duty alleged to be breached); *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (contact must be a material element of proof of claim); *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 767 P.2d 584 (1989) (contact must be a proximate cause of the injury).

Relying on *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App 409, 767 P.2d 584 (1989), Carnival argues that the "but for" test extends jurisdiction too far. The United States Court of Appeals for the Ninth Circuit withdrew its opinion in this case after *Banton* interpreted RCW 4.28.185(1)(a). *Banton*, on facts comparable to the present case, denied jurisdiction under RCW 4.28.185 (1)(a) because the claim did not "arise from" the defendant's contacts with Washington. We therefore examine that decision.

The *Banton* court first noted that this State has little case law interpreting the "arising from" portion of the long-arm statute. *Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 413, 767 P.2d 584 (1989). After observing that "[n]one of [the Washington] cases determine whether a suit for personal injuries suffered outside the forum against a foreign corporation 'arises from' that corporation's promotion and consummation of business transactions within the State", the court then looked to cases from other jurisdictions.

Among the cases relied upon by the court in *Banton* to "provide persuasive authority that Banton's cause of action does not arise from Opry's contacts in Washington", were *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986) and *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983). *See Banton v. Opryland U.S.A., Inc.*, 53 Wn. App. 409, 413, 767 P.2d 584 (1989). Both courts found no jurisdiction on facts com-

parable to those in this case. However, those cases employed a "proximate cause" analysis in determining whether a claim arises from forum contacts. *See Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1444 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989). Their reasoning was specifically rejected by the United States Court of Appeals for the Ninth Circuit.

Although the 1988 *Shute* opinion was available to the Washington Court of Appeals before it published *Banton* in February 1989, the briefs do not indicate that *Shute* was brought to the attention of the court. We thus conclude that Division One did not consider the *Shute* opinion when it decided *Banton* and that the result arguably would have been different if it had considered the then existing precedent from the Court of Appeals for the Ninth Circuit.

Carnival contends that the "great weight of authority" disfavors jurisdiction on comparable facts.[3] However, the authorities it cited are not controlling. We find them unpersuasive. We also note that other courts have asserted jurisdiction under circumstances similar to this case.[4]

The federal circuits are divided on whether jurisdiction will lie under the circumstances present in this case. We cannot reconcile the division. We conclude that Washington's long-arm statute extends jurisdiction to the limit

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[3] *See, e.g., Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986); King v. Carnival Cruise Lines, No. 82-7291 (W.D. La. Mar. 9, 1984) (Westlaw, Allfeds database); Alexander v. Carnival Tours, Inc., No. 86-A-1951 (D. Colo. Dec. 11, 1986) (Westlaw, Allfeds database); *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971 (D. Kan. 1986); *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2d Cir. 1964); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983).

[4] *See, e.g., Walker v. Carnival Cruise Lines, Inc.*, 681 F. Supp. 470 (N.D. Ill. 1987); *Everett v. Carnival Cruise Lines*, 677 F. Supp. 269 (M.D. Pa. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985).

of federal due process. The United States Court of Appeals for the Ninth Circuit has determined that federal due process permits specific jurisdiction in this case. We will not deny Washington plaintiffs the benefit of that determination.

We adopt the "but for" test of *Shute v. Carnival Cruise Lines*, 863 F.2d 1437 (9th Cir. 1988), *withdrawn*, 872 F.2d 930 (1989), and hold that there is sufficient connection between the Shutes' claim and Carnival's Washington contacts to support long-arm jurisdiction under RCW 4.28.185. "But for" Carnival's "transaction of any business within this state," Mrs. Eulala Shute would not have been injured on respondent's cruise ship. Therefore her claim "arises from" Carnival's Washington contacts within the meaning of Washington's long-arm statute.

We answer "yes" to the question certified to us in this case by the United States Court of Appeals for the Ninth Circuit.

WE CONCUR:	/s/
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C86-1204D

EULALA SHUTE and RUSSEL SHUTE,
husband and wife,
Plaintiffs,

v.

CARNIVAL CRUISE LINES, a foreign corporation,
Defendants.

ORDER

This matter is before the Court on motion of defendant Carnival Cruise Lines, Inc. (Carnival) for summary judgment dismissal on two grounds:

1. This Court lacks personal jurisdiction over the defendant, and;

2. The passenger ticket contract between the plaintiff and the defendant requires the plaintiff to bring all claims against the defendant in a court located in the State of Florida.

In the alternative, Carnival has also moved for a transfer of this cause of action to the U.S. District Court for the Southern District of Florida. This Court addresses only the issue of personal jurisdiction. The Court has reviewed the motions, affidavits, and memoranda submitted by each of the parties and grants defendant's motion for summary judgment dismissal on grounds that

there is no personal jurisdiction over defendant in Washington State.

The grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lew v. Kona Hospital*, 705 F.2d 1420, 1423 (9th Cir. 1985).

The following facts are undisputed:

During 1986 Russel and Eulala Shute, plaintiffs, contacted a travel agent at Smokey Point Travel in Arlington, Washington, and arranged to purchase tickets on the M/V TROPICALE, a vessel chartered by Carnival Cruise Lines, Inc., for a cruise to Puerto Vallarta, Mexico. The plaintiffs' tickets were issued to them from Florida with California as the port of embarcation.

While cruising off the coast of Mexico, Eulala Shute participated in a guided tour of the galley of the M/V TROPICALE. While in the galley the plaintiff slipped and fell on the wet floor. The Shutes filed this action alleging that Carnival Cruise Lines was negligent, and as a result of their negligence, Eulala Shute was injured.

Carnival Cruise Lines is a Panamanian corporation doing business in Miami, Florida. It is not registered to do business in the State of Washington. It does not own or lease real property in Washington. It has never maintained an office or bank account in Washington. It has never been required to pay any business taxes in Washington. It has never operated ships which have called on Washington ports. It has never had an exclusive agency in Washington. Smokey Point Travel is not an exclusive agent for Carnival Cruise Lines. Carnival Cruise Lines does advertise its vacation cruises in local newspapers in Washington, pays travel agencies a 10% commission on proceeds of tickets sold to prospective customers for

Carnival Cruise Lines vacations, and conducts promotional seminars for travel agents in Washington.

In its answer and by this motion the defendant asserts that this Court lacks jurisdiction over the defendant, the Carnival Cruise Lines.

To establish the existence of personal jurisdiction in a diversity case, the plaintiff must show (1) that the statute of the forum confers personal jurisdiction over the nonresident defendant, and (2) that the exercise of jurisdiction accords with federal constitutional principles of due process. *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986). *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987). *Data Disc, Inc. v. Stems Tech. Assoc., Inc*, 557 F.2d 1280 at 1286 (9th Cir. 1977). The Washington long arm statute states that

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) the transaction of any business within the states; . . .

RCW 4.28.185(1)(a).

If a defendant is found to have minimum contacts with Washington State and if maintenance of an action against them does not offend the "traditional notions of fair play and substantial justice," due process is also satisfied. *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278 (1940).

General jurisdiction will attach even if the cause of action is unrelated to Carnival's activities in Washington if such activities are substantial or continuous and systematic. *International Shoe*, 326 U.S. at 318. Carnival's contacts with Washington, however, are insufficient to warrant general jurisdiction. *Sarda M. Clark v. Carnival Cruise Lines, Inc.*, No. C84-4444TB (W.D. Wa. Jan. 16, 1987) (finding no personal jurisdiction on similar facts). There is no evidence that the above-stated contacts are continuous and systematic. In 1985 and 1986 Carnival derived only 1.29% and 1.06% of their total income from Washington residents. Such figures show that the results from the seminars and the advertising are not substantial.

For limited jurisdiction to be granted the court must evaluate the defendant's forum-related activities in relation to the plaintiff's cause of action with the following three-prong test:

> 1. The nonresident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> 2. The claim must be one which arises out of or results from the defendant's forum-related activities; and
>
> 3. Exercise of jurisdiction must be reasonable.

Data Disc, 557 F.2d at 1287.

Carnival did not purposefully avail itself of the benefits and protections of Washington law by merely advertising, issuing a ticket in Florida to a Washington travel agent who is not a sole agent for Carnival, or by conducting promotional seminars in Washington. *Sarada M. Clark v. Carnival Cruise Lines, Inc., supra*; *Helicopteros Nacionales de Colombia v. Hall*, 406 U.S. 408, 416 (1984).

This purposeful availment requirement is the test for the fundamental determination of whether "the defend-

ant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." *World-Wide Volkswagen*, 444 U.S. 297, 100 S.Ct. 567; *see Haisten*, 784 F.2d at 1397; *Lake v. Lake, supra.* In this case Carnival, a Panamanian corporation, has subjected itself to the jurisdiction of Florida. Defendant likely has advertising and seminars nationwide which are substantially similar to those in Washington. In the event an entire ship should sink, it would be unreasonable for the defendant to anticipate being hauled into court in all 50 states Yet, to find there is limited jurisdiction in this case would amount to the same thing.

The additional contact of conducting seminars was not addressed in *Clark, supra*; however, this Court finds that such actions were not a "substantial connection" to Washington.

A substantial connection "between the defendant and the forum state [is] necessary for finding minimum contacts [and] must come about by an action of the defendant purposefully directed toward the forum state." *Asahi Metal Industry Co. v. Superior Court*, 94 L. Ed.2d 92 (March 1987), *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

In order to find limited jurisdiction, the cause of action must arise out of that particular purposeful contact of the defendant with the forum state. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957); *Lake, supra*, at 9. Plaintiffs do not state that they chose Carnival Cruises as a result of their advertising. Defendants properly state that this tort action did not "arise out of" or "result from" defendants' advertising or seminars. The tort did not occur as a direct result of the defendant's advertising. *Cheyne v. Klosters Rederi, d/b/a Norwegian Caribbean Lines*, C81-1253R (1982).

THEREFORE, defendants' motion for summary judgment dismissal is GRANTED. The Court finds no basis for personal jurisdiction in Washington State.

The Clerk of this Court is instructed to send a copy of this Order to all counsel of record.

DATED this 25th day of June, 1987.

/s/ Carolyn R. Dimmick
CAROLYN R. DIMMICK
United States District Judge

U.S. Const., Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

46 U.S.C. § 183b. Stipulations limiting time for filing claims and commencing suit

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period

for institution of suits to be computed from the day when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim—

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative: *Provided, however*, That such appointment be made within three years after the date of such death or injury. R.S. § 4283A, as added Aug. 29, 1935, c. 804, § 3, 49 Stat. 960.

46 U.S.C. § 183c. Stipulations limiting liability for negligence invalid

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such

loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect. R.S. § 4283B, as added June 5, 1936, c. 521, § 2, 49 Stat. 1480.

28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

28 U.S.C. § 1406. Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district

shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, "district court" includes the United States District Court for the District of the Canal Zone; and "district" includes the territorial jurisdiction of that court.

Fed. R. Civ. P. 4(e)

SUMMONS: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Wash. Rev. Code Ann. 4.28.185:

Personal service out of state—Acts submitting person to jurisdiction of courts—Saving

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an

action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.